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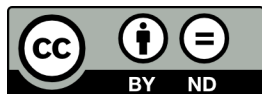
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Law in Motion

50 Years of Legal Change

Edited by Lisa Claydon, Caroline Derry and Marjan Ajevski



The Open
University

LAW SCHOOL



The Open University Law School

Walton Hall, Milton Keynes MK7 6AA

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This book is dedicated to

Gary Slapper

1958-2016

the first Head of The Open University Law School

Suzanne Slapper

Dedication

In all his books, Gary would always write a dedication to myself, my daughters and his family in the acknowledgements. It is an honour to at last repay that kindness with a little dedication of my own.

Gary's first contact with the OU was in May 1987 when he applied to be an associate lecturer. As a young law graduate, he was keen to test out his skills and knowledge and, more importantly, pass them on. Unfortunately, that first contact resulted in a firm rejection! Gary hadn't realised that the OU didn't have a Law School and that there were no plans to create one.

Fast forward ten years and Gary found himself in London launching the new OU Law Programme with Cherie Blair. He was so excited to take up the challenge and hard work of creating a new Law School from scratch, and determined to make a success of it. He spelt out his motivation at a dinner to celebrate the first OU Law graduates in 2002. He said he understood the importance of law because it touched everyone's lives from birth to death and beyond; and for the lowliest individual to multi-national corporations and Governments. Despite this he said, 'only a minuscule portion of the overall population realistically had the chance to study law'. He felt that for Law to work properly it had to be not only for the people, but of the people and that the challenge for the 21st century was to make the legal profession more representative. As he put it, 'variety is the spice of Law as much as it is of life'. He wanted to move from a position where Law Lords took OU degrees, to where the OU educated the future Law Lords!

In his valedictory speech Gary spoke of his admiration for Jenny Lee and the social benefit of the OU. From its inception in 1997, to the time of his leaving, the Law School grew from 700 students and 25 associate lecturers, to 7000 students and 400 associate lecturers and was the largest Law School for undergraduates in the UK. This was thanks not only to Gary, but also to all the dedicated people who worked with him over the 15 years and 29 days he spent at the OU. At the end he felt he had made a contribution to the diversification of the legal profession as he had set out to do. He wrote of his days at the OU that, 'almost all of them had been an absolutely wonderful, unalloyed privilege'. I know that he would be glad that the OU Law School continues in its successes and, as ever, most of his praise would be for the hardworking students who ensure that his vision will become reality.

From his loving family, Suzanne, Hannah, Emily, Charlotte, Ivor, Doreen, Clifford and Maxine.

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Opening Thoughts

Chapter 1

Open & Shut Cases

Simon Lee¹

Abstract

Around the time of the birth of the Open University, Mr Justice Megarry set out a fundamental lesson on open-mindedness: “As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not ...’ *John v Rees* [1970] Ch 345, 402. This essay takes ten examples rarely explored in law schools to encourage reflection on how to keep an open mind, rather than succumb to prejudice in pre-judging people, cases or issues. ‘The path of the law’ was the title of a famous lecture by the great American judge, Oliver Wendell Holmes, which ends, as does this essay, by affirming such an unusual collection of stories: ‘The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.’

1. Introduction

Around the time of the birth of the Open University, Mr Justice Megarry set out a fundamental lesson on open-mindedness:

‘As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.’²

Fifty years after the case was reported, this insight needs constant reiteration as a safeguard against witch-hunts³ and as a positive encouragement to draw the most out of deepening our

¹ This essay began as my inaugural professorial lecture, delivered at The Open University on 4 May 2017. My grandson, Joshua Wright, was watching on-line in Switzerland at the age of two and a half, while my granddaughter, Madeleine Lewis-Oakes, was there in the lecture-hall on campus in Milton Keynes, aged 5 months. The essay is dedicated to them and to Madeleine’s brother, Theo, who was born in 2019. I am grateful to generations of students, to Lisa Claydon, other colleagues, friends and family for comments, especially my son, Jamie. The usual disclaimers apply, that others, particularly Joshua, Madeleine, Theo and Jamie, are not responsible for any of my errors, judgments or mis-judgments.

² Megarry J, *John v Rees* [1970] Ch 345, 402. [1969] 2 All ER 274 Quoted, for example, in Sandra Fredman & Simon Lee, ‘Natural Justice for Employees: the Unacceptable Faith of Proceduralism’ (1986) 15 *Industrial Law Journal*, 16. As a barrister and lecturer, Megarry had been prosecuted for submitting false tax returns but the judge directed the jury to acquit as there was no intention to defraud. The lingering effect on his career of this experience may have influenced Megarry’s emphasis on ‘unanswerable charges which, in the event, were completely answered’.

³ A prime example would be ‘Operation Midland’. A fantasist initially known as ‘Nick’, later revealed to be Carl Beech, claimed to have been abused by politicians and other public figures; the police and Tom Watson MP seemed to believe him, with terrible consequences for the reputations of others, and the well-being of them and of their families. After he was imprisoned for 19 years, the Henriques report set out some of the failings of gullible

understanding of law. It is the most significant dictum I have encountered in my studies of the law over five decades. It is beautifully expressed. It is original in its composition but it nods to the history of the law. It is rigorous in its sub-clauses but compelling in its overall message. In a sphere of life where hierarchy usually rules, it comes in a humble first instance decision, the facts and context of which are rarely recalled. It was initially missed by the system of court reporting but speaks to us over half a century later. It sums up the essence of open-mindedness, which is in turn the essence of law and justice. It warns against pre-judging, which is the root of prejudice. It hints at the possibility of redemption, which might be the hope of us all in an age given to harsh judgments of the past and of others in the present. It is, in essence, a plea against the rush to assume fault and a hymn, instead, to open-mindedness.

Critics bewail the practice of lawyers, as they see it, of relying on technicalities. In this essay, I focus instead on a nobler aspect of thinking like a lawyer, one which could be helpfully adopted in wider life, namely keeping minds open to the possibility that all is not as it first seemed. Such a mindset is wary of jumping in to judge a story on first, partial or even partisan, impressions. Approaching a problem with a closed mind is how 'prejudice' gets its name, because of the tendency to pre-judge a person or an issue.

Megarry's dictum gives a nobler understanding of why it is important that lawyers or others should be allowed to invoke the need for a fair process and why it would be wrong for their clients to be pre-judged. It is part of the art of lawyers to make their points in a compelling manner. Megarry's life-long practice of noting down aphorisms, publishing many in miscellanies,⁴ shaped his style. The phrase 'fixed and unalterable', for example, would be known to him as a description of the famously, or notoriously, inflexible decrees of the Medes and Persians, as attested in the Bible.⁵ Megarry's whole passage conjures up, even against such determined positions, the need in a just society for decision-makers to keep their minds open until they have considered the evidence.

In giving ten examples against which to test Megarry's wisdom, this essay broadens the range of materials routinely presented to law students and other citizens as emblematic of law. There is only one case here from the Court of Appeal and one from the Supreme Court of the UK, neither well-known. Some of these 'cases' did not even make it to court. Others are at the modest level of magistrate or other first instance decision-making. Each can only be sketched briefly, in a single paragraph. Each has been chosen as an antidote to assuming that an incident is open and shut. Megarry's dictum is not taken as providing a complete taxonomy of errors. Its sub-themes could be seen as tautologous, albeit that they were combined to great rhetorical effect. Instead, each of these ten sagas is presented as offering a particular insight into Megarry's broad and wise assertion about the path of the law. Few readers will warm to all the characters who are featured. Whoever is demonised in a reader's circle or by society is exactly the person whose case should be a touchstone for the application of Megarry's litany. The aim is partly to encourage the sharing of other experiences, other examples of 'open and shut cases that, somehow, were not', because restricting students to appellate hard cases or even uneasy cases is not conducive to a well-rounded, liberal education in, or through, the law. As the American academic and judge Charles E Clark observed of Karl Llewellyn, 'his principle of pedagogy' was 'not to tell his students truths, but to force them to seek out the answers themselves'.⁶

and reckless police officers although the report was redacted and so it took until late 2019 for the full scale of the mistakes to be widely known.

<https://www.theguardian.com/uk-news/2019/oct/04/operation-midland-met-police-boss-urged-to-consider-her-position>

⁴ Three *Miscellany-at-Law* books (Stevens, 1955) and one *Arabinesque-at-Law* (Wildy, 1969).

⁵ Esther i.19, Daniel vi.8.

⁶ C Clark, 'K N Llewellyn', (1962) 29 *University of Chicago Law Review* 614.

John v Rees

Although the *John v Rees* case was only reported in 1970, it was decided in 1968. Its context was an argument between members of the Labour Party in Pembroke, Wales. Desmond Donnelly, the MP for the constituency had published a book called *Gadarene '68*.⁷ The book's subtitle was 'The Crimes, Follies and Misfortunes of the Wilson Government'. Yes, that was a Labour MP attacking his leader and his government's policies, a practice which is common to many political parties in many countries, both before and after that era. A meeting of his constituency party called to deselect Donnelly, but not just for this, broke up in disorder. His supporters were summarily expelled from the party. The issue for Megarry J was whether they were entitled to a hearing before expulsion. Whether they should have been accorded that opportunity as a principle of natural justice. For all the reasons given below and for all the sub-clauses of Megarry's aphorism, a hearing might explain behaviour in such a way as to change the decision-maker's mind. This aspect of the turmoil in the local party was part of wider litigation which has been admirably explained by J Graham Jones.⁸ As for Desmond Donnelly, he was a complex character who described himself as an Englishman with an Irish name representing a Welsh seat, and who had been born in India, with, according to Donnelly, 'no personal racial prejudice at all – I grew up completely bi-lingual in English and Hindustani'.⁹ The paragraph in which that appears, however, has other controversial statements about the 'British problem ... At root it *is* a colour problem and of alien civilisations and incompatible habits' and he believed that what he claimed was his own lack of personal racial prejudice 'is not the case with the majority of the insular British people'. Donnelly was a maverick, a trouble-maker and a troubled soul. He hopped from one political party to another. He concluded that harsh book, *Gadarene '68*, with a beautiful manifesto of his own but he took his own life a few years later.

2. Opening up the Law

The Open University received its Royal Charter in 1969, the year after this case was decided. The judge's poetic reminder of basic propositions remains timely fifty years later. It speaks to the values of the Open University, which is one of the finest achievements of the very same Wilson government that Donnelly was berating. Megarry's aphorism encourages us to await a deeper understanding of the facts of a controversy, warning us against pre-judging or prejudice. At its most idealistic, it is encouraging open-mindedness. In this essay, a quartet of lessons illustrates Megarry's sub-clauses. In keeping with the spirit of the Open University's first law professor, Gary Slapper,¹⁰ original or at least unusual examples are used as a fresh alternative to the familiar cases presented to law students. In the tradition of inaugural lectures, I also offer a glimpse or two of my own path, or meandering, in the law. In the spirit of the Open University's mission, musings on these sagas are directed towards students in particular but all of us in general. Broadening out from the experiences of students who have been mis-judged, we can then move from Megarry's strictures about errors towards a more expansive, positive approach to educating ourselves in and through the law.

1 Students in trouble with their studies, their university, or the police (or anyone in any trouble of any kind) can still succeed in the law and wider life. Ideally, any difficulties caused by others could be addressed through a fair hearing at the time but, if that does not happen, there are often later opportunities to explain what was initially assumed to be inexplicable.

⁷ Desmond Donnelly, *Gadarene '68* (William Kimber, 1968).

⁸ <http://www.pembrokeshirehistoricalsociety.co.uk/the-pembrokeshire-general-election-of-1970/>

⁹ *ibid* 189.

¹⁰ https://www.thetimes.co.uk/article/the-man-who-brought-law-to-life-85q0h3pm8_

2 It follows from such experiences that we should not rush to judgment when others are accused of behaving badly. Instead, we should hold on to the presumption of innocence, not pre-judging others, learning from reading fiction and watching detective dramas on screen that the most obvious suspect is not necessarily the guilty one, recognising that there *can* be smoke without fire, and that even if someone is convicted, there might have been a miscarriage of justice.

3 More positively, the converse of a miscarriage of justice, a delivery or perhaps a carriage, has its own impact: the unheralded humanity and dignity, under pressure, of a just decision under the rule of law has the power to transform individuals, communities and society.

4 It follows that we should always be refreshing our understanding of the characters and the character, even the genius, of the law and of wider life if we would like to become, or remain, open-minded.

These lessons combine to form a celebration of, and call for, cultivating open-mindedness in the law and in society through reflection on twelve supposedly open and shut cases.

The phrase Megarry uses, 'The Path of the Law',¹¹ is the title of a famous lecture given to Boston University law students at the end of the nineteenth century by the great American judge and jurist, Oliver Wendell Holmes, Jnr. He began by saying that the path of the law is not a mystery. That is where Holmes goes wrong. The law *is* a mystery and the *path* is the wrong metaphor. These points are related. A path is usually beaten through the most direct route but the law, like this essay, meanders or, as I would put it, has twists and turns. As Mark Twain observed, the African-American pilots on the Mississippi had to know the shape of the river, every bend, the depth at every point, and to be alert to the fact that the river is in constant flux.¹²

Of course, other disciplines are also full of excitement but when it comes to having fun, nobody can match the only other professor to have given an Open University inaugural lecture in law during these first fifty years, the late Gary Slapper, who invented and popularised a category of 'weird cases',¹³ which did so much to draw students and the public into an appreciation of the law. He had a serious intent, both in establishing himself and the Open University in the hearts and minds of lawyers and in educating us all.¹⁴

2.1 Categorising cases as weird, easy, hard, uneasy or not 'open and shut'

Although there are variations on the idea of 'weird' cases¹⁵, the more familiar expressions are that law students mostly consider 'hard' cases, as opposed to 'easy' cases. Hard cases are ones where lawyers reasonably disagree on the interpretation of the law. I have previously suggested a sub-set of hard cases which raise such moral qualms that I call them 'un-easy' cases.¹⁶ If you do not have a sense of ethical unease, whichever way you would decide, then you have probably not understood the moral issues and diverse perspectives at stake. This essay, however, addresses some of those supposedly simpler cases, the seemingly easy

¹¹ O W Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.

¹² William G Bowen & Derek Bok, *The Shape of the River*, (Princeton University Press, 1998) see Mark Twain, *Life on the Mississippi*, quoted in the epigraph and at p275, Bowen and Bok, Preface at pxlix.

¹³ Gary Slapper, *Weird Cases* (Wildy, 2009).

¹⁴ For example, this tweet by Gary Slapper about lawyers' rivalry from their student days captures something about F E Smith, who became Lord Birkenhead:

<https://twitter.com/garyslapper/status/325180123055804417?s=20>.

¹⁵ eg 'misleading' or 'uncommon' cases, A P Herbert, *Misleading Cases in the Common Law*, 1927; *Uncommon Cases* (Methuen, 1935).

¹⁶ Simon Lee, 'Uneasy cases' in Brice Dickson & Paul Carmichael, *The House of Lords: Its Parliamentary and Judicial Roles*, (Hart, 1998); Simon Lee, *Uneasy Ethics* (Random House, 2003).

ones, those that appear to be open and shut cases, which are apparently strewn across the path of the law.

2.2 Towards open-mindedness

This essay argues that open-mindedness matters and needs to be developed through the guidance of this Megarry dictum and the often painful experience of practising, failing, trying again, still failing but still striving to be open to argument. This is the essence of a legal education but is much needed in wider life. If we pre-judge cases or issues as open and shut when they are not, then our prejudice can cause damage to other individuals, to communities, to society and to ourselves. More generally, we can all learn all the time from the study of law and of other disciplines to be more open to the evidence, to insights, to the truth, to the facts. This is especially important in an era dubbed as 'post-truth', a time of 'fake news'. Being or becoming open-minded is not itself an open and shut case. It requires humility, imagination, constant attention and a commitment to self-improvement.

Some people do not seem to *want* to be open-minded, at least on their core beliefs, or sense of identity, or their insistence that one factor can explain everything. Even for those who really do wish to be open-minded, not just to say we are, but actually to be or become or remain open, we have to think about it and work at it. So this essay is not a claim to be especially open-minded myself. It is more of a coaching manual for those who might surpass me in this endeavour.

2.3 The meaning of 'open and shut'?

As a start, what is it, in the open and shut metaphor, which is being opened and shut? We could be comparing a legal case, or any other issue, to the opening and shutting of a suitcase, a file, a door, a gate, a window or a book, to give a few examples. All of these can be partially opened or partially shut. Some can be shut but not necessarily locked. If Megarry's metaphor is going to work, is that which is being opened and shut the kind of thing which can be strewn over or around a path? Paths or, in my preferred imagery, rivers, are not usually strewn with windows, doors or books, although canals do have locks. It is our *minds* which are most likely being described as open or shut, or closed, when we consider Megarry's sub-categories of unanswerable charges, inexplicable conduct, fixed & immutable policies. An open mind is not an empty mind. Keeping your mind ajar is not about keeping it *in* a jar.

The ten incidents, not all 'cases' as normally understood, have been chosen partly for their obscurity, as otherwise readers would come to them with more of a risk of pre-judging, and partly because of the fame, or later fame, of some of the people involved or because I predict that greater fame will follow. The lessons of Megarry's dictum, though, need to be lived out in a different kind of obscurity, in the little steps we each take along the path of the law towards social justice. I am going to call these ten examples by the name of the principal character: Bob, FE, JK, Mrs P, Cornelia, Harper, Winston, Gerry, Eamon and Jennie.

(1) Bob: informed questioning can reveal distortions in an official's view of events

A postgraduate student, Robert, who already had a first class undergraduate degree in Law, was found guilty of dangerous driving on the word of two police officers and fined £40. This was in Oxford decades ago. The same student then pleaded guilty to attempting to steal a street-lamp and was fined £5. The second offence was missed, or glossed over, by the media, this mattered to the defendant who had political ambitions. Then, on appeal against his conviction for dangerous driving, his barrister had a problem in wishing to cite his client's clean driving record and challenge the police officers account for fear of allowing the prosecution to reveal Robert's other conviction. The strategy was not to put the defendant on the stand but to produce a witness, the fellow passenger. That student failed to turn up on time. The court

adjourned. Eventually, the witness arrived, looking dishevelled. The judge asked why he was late. He said defiantly that he was playing rugby for his college. At this point, the case seemed open and shut. What happened next? The deputy recorder asked which college the witness was representing. No, it was not the judge's college but it was his father's college. It was their first cup final. So things started to look up and then the court became more open-minded to the idea that the police might be lying. The barrister for the defendant asked the two police officers the same question, without the other one present in court to hear the answer: was the window, through which the defendant was said by them to have made an obscene gesture, fully down or three-quarters down? One said fully, one said three-quarters. Since the barrister knew from the defendant that neither could be true, because the window of the van did not open or shut like that but had one fixed panel and one sliding panel which could only be partially pushed out sideways, it was game, set and match to the defendant. Well done, that barrister and that witness for the defence in the 1950s. The defendant was a Rhodes Scholar at Oxford, Bob Hawke, who was elected Prime Minister of Australia in 1983, 1984, 1987 & 1990.¹⁷

(2) F E: such differing accounts do not necessarily mean perjury by an official

A second case takes us back to 1897, when the Prince of Wales was visiting Oxford and was met by a demonstration. Metropolitan Police on horseback, supplementing the local constabulary, made lots of arrests including a Mr Smith,¹⁸ a young don who had recently graduated with the Vinerian Scholarship for the best papers in the Bachelor of Civil Law which, despite its name, is a Masters degree. The police arrested Smith, put him in a cell overnight and charged him with assaulting a police officer and obstructing the police in the discharge of their duty. Great law professors came to his aid. Dicey wrote to him, offering £5 towards a barrister for his defence, and sat in the front row of the magistrates' court alongside Professors Anson and Markby. Smith defended himself. He challenged the police officer's evidence that Smith had hit him, claiming that he, Smith, had kept his hands behind his back. The prosecutor asked, 'What do you mean by accusing this officer of wilful and corrupt perjury?' Smith said that perjury was only one of five possibilities. Another was that he himself was committing perjury. A third was that the police officer was honestly mistaken. The fourth was that he himself was honestly mistaken. And the fifth was that the apparently irreconcilable accounts were somehow reconcilable (which could have been another phrase in Megarry's list of open and shut cases). Smith, often known by his initials F E, was acquitted and later became the Solicitor-General, then the Attorney-General and then, as Lord Birkenhead, the Lord Chancellor. In the middle of that sequence, he asked Dicey, in his eighties, to appear with him as counsel for the Crown in a House of Lords appeal during the First World War, on whether the royal prerogative survived when a statute was passed, a gesture which was, I suspect, a generous nod towards Dicey's support in 1897.¹⁹

(3) J K: avoid pre-judging a case because we like or dislike one of the litigants

There was a claim a decade ago against the author J K Rowling of misappropriating a virtually unknown author Adrian Jacob's ideas in a work of fiction. A similar charge is often made against musicians, from George Harrison to Led Zeppelin. J K Rowling sought to have the case struck out but the judge thought there was a possible case. Nobody doubts that J K Rowling created Harry Potter as a work of originality. Suppose, however, that her agent had

¹⁷ Simon Lee, *Vincent's 1863-2013* (Third Millennium, 2014), 111-112, referring to Blanche d'Alpuget, *Robert J Hawke: A Biography* (Penguin, 1984).

¹⁸ This is the Smith about whom Gary Slapper tweeted concerning his prize and the runner-up, Holdsworth, fn15 https://twitter.com/garyslapper/status/325180123055804417?s=20_

¹⁹ Simon Lee, 'Dicey Sentiments', U.K. Const. L. Blog (29th November 2016) https://ukconstitutionallaw.org/2016/11/29/simon-lee-dicey-sentiments/_

many years before received Adrian Jacob's manuscript of a children's story about a wizard, rejected it and genuinely forgot about it. Suppose now that the agent in conversation offers some ideas to the author when she is under pressure to meet deadlines for sequels and honestly forgets that some of those ideas have come from Adrian Jacob's earlier manuscript. J K Rowling is innocent of any conscious wrongdoing and is accordingly indignant and was able to 'win' the case in the eyes of the media if only because Adrian Jacob's estate could not afford to pay J K Rowling's and her publisher's legal costs into court so the action was discontinued.²⁰ But the truth of what happened is not open and shut. It is obscure and sometimes one side cannot afford the cost of access to justice. The agent is dead, the relatively unknown writer is dead, the famous author's notebooks were not yielded up in the course of litigation, and accounts differ as to whether the agent and the almost unknown author only met once, as the agent claimed, or more often, as Adrian Jacob's estate claimed and as both had homes on the small Maltese island of Gozo. It is perfectly possible, however, that an idea was transmitted and absorbed without any bad faith on the part of anyone.

(4) Cornelia: an advocate who has herself experienced discrimination can help a vulnerable defendant weather the storm

Cornelia Sorabji²¹ has been described as India's and the UK's first woman barrister and as Oxford's first female law student. There can be quibbles about the technicalities of being called to the Bar but without doubt she was a pioneer of women in the law, both in India and in the UK. She is variously reported as having been appointed as the Legal Assistant or as the Lady Assistant to the Court of Wards. Her first case was different. It was what our Open Justice²² initiative would call 'pro bono'. On returning to India in 1894, having studied in England, she was not allowed to qualify as a barrister (actually, for decades) but was asked nonetheless to help a woman accused of murdering her husband. Cornelia Sorabji recognised that the Statutory Law of India allowed 'any person' to defend the accused and the Bombay High Court confirmed that therefore a woman could appear in court. Witnesses were openly being bribed by the prosecution who had charged a woman with the murder of her husband. The case seemed open and shut. Sorabji realised that there was something even more elemental than the lure of money in a disadvantaged rural community, namely the weather. She persuaded the all-male jury that in the monsoon it would not have been possible for the body to have been left in the pools of blood in the location in which it was found, on a steep slope. The blood and the body would have been washed down the hill. It was much more likely that the murderer was the chief 'witness' against the accused, a man in debt to the murder victim, who then planted the body and blamed the victim's wife.

(5) Mrs P: outsiders appreciating the traditions of fair play

The accusation of racism is often thrown at politicians and political institutions. For example, it seems inexplicable to some that the Home Office would do this or that, or not do this or that, unless it is because the decision-maker is racist. At the time of writing, we have a Home Secretary from an ethnic minority background, Priti Patel, as was her immediate predecessor Sajid Javid, but the department is still accused of racism. Conversely, the Home Office is often praised for its comparative liberalism under Roy Jenkins as Secretary of State in the Labour governments led by Harold Wilson from 1965 to 1967 and again from 1974 to 1976. But I have written about a lost or neglected case²³, one in which the Home Office in the midst of that Jenkins era's legislation against sex and race discrimination, tried to delay an Indian and a Bangladeshi woman from exercising their partial rights to citizenship. Mrs Phansopkar and

²⁰ *Allen v Bloomsbury & Another* [2010] EWHC 2560 <https://www.bailii.org/ew/cases/EWHC/Ch/2010/2560.html>.

²¹ Cornelia Sorabji, *India Calling: the Memories of Cornelia Sorabji* (Oxford University Press, 2001); Richard Sorabji, *Opening Doors: the Untold Story of Cornelia Sorabji* (I B Tauris, 2010).

²² Open Justice <http://law-school.open.ac.uk/open-justice>.

²³ Simon Lee, 'Lord Denning, Magna Carta and Magnanimity' (2015) 27 *Denning Law Journal* 106.

Mrs Begum were refused entry at Heathrow and told to go back home, to India and Bangladesh, to apply, where the queue would take fourteen months. The Court of Appeal found for the women using creative arguments including one from Magna Carta in the thirteenth century, that justice delayed is justice denied. The two barristers in this case had themselves been refugees. One of those, Sibghat Kadri QC, had himself been interned without trial as a student in Pakistan, before securing his own release with a writ of habeas corpus. The Home Office claimed that it would have been 'queue-jumping' for the women to have their citizenship decided at Heathrow. The judges saw the case differently, that the underlying value of the law was in vindicating their rights swiftly.

(6) Winston: it is never too late for technology to re-open a shut case

Winston Silcott was tried for three murders in the 1980s but did he actually commit any of them? He was acquitted of the first. When he was convicted of the third, it emerged that he was on bail for the second. MPs called for the judge who let him out on bail to resign. On the next day's BBC Breakfast TV and ITN News at lunchtime, I commented on this breaking news. Even then, it was important to bear in mind that Winston Silcott could appeal and that those accusing Judge Lymbery of inexplicably giving him bail were legislators who had determined the framework within which the judge made that decision.²⁴ The campaign by the women of the area²⁵ played a huge part in challenging the perception that Silcott was guilty. I like to think that in continuing to discuss the iniquities of such cases when I moved to Queen's University Belfast I might have sparked, or at least not dampened, the interest of law students there, one of whom went on to be Winston Silcott's courageous and determined solicitor on this side of the Irish Sea. Tony Murphy²⁶ eventually succeeded in getting the conviction quashed and continues to argue that the conviction for the murder of the second, for which Winston Silcott served seventeen years in prison, was wrong because the killing was in self-defence. Those who believe there is no smoke without fire will be susceptible to the line that someone in this position has been released on a 'technicality'. So it is important to emphasise that there never was any scientific evidence that connected Winston Silcott to this third murder, of PC Keith Blakelock in the Broadwater Farm or Tottenham riots, no image of him on any of the extensive CCTV footage of the riots that evening, suggesting that he was in his sister's flat, as he claimed, observing the curfew of his bail condition and keeping out of trouble, there was no confession and only unreliable claims by youngsters that he was the leader of the gang. Silcott allegedly stated that they would not stand by those claims in court, and this was interpreted as a kind of admission of his involvement. What tipped the balance on appeal against conviction was that the invention of ESDA testing which showed that this ambiguous statement was not actually made by Silcott but was added later, made up by the police²⁷. Electrostatic deposition analysis can show whether notes were made contemporaneously by examining the indentations on subsequent pages.

(7) Gerry: opening up official records can re-open a shut case decades later

To give a sense of the time-span involved in righting this next wrong, the first Open University graduation took place on 23 June 1973 and the relevant decision by a government minister, an interim custody order (ICO) was taken on 21 July 1973. The UK Supreme Court made its decision in May 2020,²⁸ concluding that Gerry Adams had been interned unlawfully in 1973

²⁴ Simon Lee, 'Bail Conditions' (1987) 103 LQR, 327

²⁵ Legal Action for Women, *A Chronology of Injustice* (Crossroads, 1998)

²⁶ https://www.theguardian.com/uk/2003/oct/20/ukcrime_

²⁷ https://www.theguardian.com/fromthearchive/story/0,,1092766,00.html_

²⁸ R v Adams [2020] UKSC 19, [2020] 1 WLR 2077, <https://www.supremecourt.uk/cases/docs/uksc-2018-0104-judgment.pdf> Lord Kerr: 'At stake on this appeal is the validity of the ICO made on 21 July 1973. Although an ICO could be signed by a Secretary of State, a Minister of State or an Under Secretary of State, the relevant

and so could not have been guilty of attempting to escape unlawfully. Mr Adams was widely believed to have been a leader in the IRA but was certainly known later in the 'Troubles' to be President of Sinn Féin, an abstentionist MP and a major figure in the peace process, notably in the Adams-Hume dialogue. Along the way, he was one of the people whose voice had to be dubbed and/or subtitled, when the broadcasting restrictions were in force from 1988. When I left Queen's University Belfast in 1995, both the leading counsel in this case, Sean Doran QC for Mr Adams and Tony McGleenan QC for the Secretary of State, were colleagues in the Law School and the latter had been one of my first students there. At the same time, Sir Brian Kerr was a High Court judge but now he was the presiding judge in this appeal, who gave the main judgment with which his fellow Justices all agreed. In between times, he had been the Lord Chief Justice of Northern Ireland. His predecessor but one, then Sir Brian (later Lord) Hutton, was the barrister who, as leading counsel to the Attorney General in 1974, gave his opinion that the order in 1973 was not lawfully made. This was because in Brian Hutton's view, endorsed 46 years later by the Supreme Court, it should have been the Home Secretary himself, not his Minister of State, who had to consider the case of Mr Adams. It was only when Cabinet papers were released many years later that Gerry Adams' lawyers became aware of this and brought the proceedings which eventually resulted in this judgment.

(8) Harper: as fiction shows, characters evolve

In watching films and television, and in our crime fiction reading, we know that the case is not as open and shut as it first seems, the obviously guilty person is usually innocent and the seemingly innocent are the ones to watch. In *Broadchurch*, *Line of Duty* or any number of episodes of *Morse*, *Lewis*, *Endeavour*, or *Midsomer Murders*, we do well to remember the presumption of innocence. In series 3 of *Broadchurch*, for example, there was such an unedifying collection of men in the small town, including a recently released rapist, that we could suspect them all. The challenge is to ask why can we not be as discerning, imaginative and yet measured in viewing politics, law and the media in real life as we have become adept at suspending judgment in our watching of crime drama? Instead, we are ready to think the worst of others, to believe that our real life and our fictional heroes are villains after all. In Harper Lee's *To Kill A Mockingbird*,²⁹ Atticus Finch, for instance, was a hero to Barack Obama and many others but has now been written off as a 'racist' by some after the publication of another book by Harper Lee, *Go Set A Watchman*.³⁰ At Queen's University Belfast in the early 1990s, we had asked all first year law students to write a very short sequel to the one book

legislation provided that the statutory power to make the ICO arose "where it appears to the Secretary of State" that a person was suspected of being involved in terrorism. There is no evidence that the Secretary of State personally considered whether the appellant was involved in terrorism. On the assumption (which is common to the parties to the appeal) that he did not, the question arises whether the ICO was validly made.

'5. The reason that this matter has come to light so many years after the appellant's convictions is that under the "30-year rule" an opinion of JBE Hutton QC (later Lord Hutton of Bresagh) was uncovered...

'6. Mr Hutton was the legal adviser to the Attorney General when he gave his opinion. It was dated 4 July 1974 and responded to a request for directions in relation to a proposed prosecution of the appellant and three others involved in the attempted escape on 24 December 1973. Mr Hutton concluded that a court would probably hold that it would be a condition precedent to the making of an ICO that the Secretary of State should have considered the matter personally.

'7. The appellant became aware of Mr Hutton's opinion in October 2009. He had not appealed his convictions before then. Sometime after learning of the opinion, he applied for an extension of time in which to appeal his convictions... the power invested in the Secretary of State by article 4(1) was a momentous one ... The provision did nothing less than give the Secretary of State the task of deciding whether an individual should remain at liberty or be kept in custody, quite possibly for an indefinite period ...

'39... there was no reason to apprehend (at the time of the enactment of the 1972 Order) that this would place an impossible burden on the Secretary of State. Indeed, the subsequent experience with Mr Merlyn Rees scotches any notion that this should be so...

'41. The making of the ICO in respect of the appellant was invalid. It follows that he was not detained lawfully. It further follows that he was wrongfully convicted of the offences of attempting to escape from lawful custody and his convictions for those offences must be quashed.'

²⁹ Harper Lee, *To Kill A Mockingbird* (Heinemann 1960).

³⁰ Harper Lee, *Go Set A Watchman* (HarperCollins, 2015).

they had almost all studied at school, Harper Lee's *To Kill A Mockingbird*. They asked for a 'model answer' which, of course, was missing the point and beyond me but I did eventually write my own response to the task. It was then published in the second edition of our book of teaching materials from this pioneering course on learning legal skills.³¹ A quarter of a century later, it emerged that Harper Lee had written her own 'sequel' or, to be precise, that the novel we knew was developed at the suggestion of an editor from her original manuscript. My version can now be compared with Harper Lee's *Go Set A Watchman*. In mine, the young girl narrator, Scout, is now known by her proper name, Jean Louise, and is being appointed as the first woman Justice of the United States Supreme Court. In Harper Lee's own version, she is indeed known as Jean Louise, but is in a dead-end job. In mine, she cares for Atticus Finch, her father, in his dying moments. In Harper Lee's version, she is outraged by Atticus and denounces him as a racist. But media reports that Atticus *is* a racist are not the last word. Harper Lee was, in my opinion, drawing not only on her father's legal career but also on the life of the father of one of her fellow law students at the University of Alabama. Hugo Black had been a member of the Klu Klux Klan when seeking election to the US Senate but he became one of the most liberal of US Supreme Court Justices in history. Atticus was not a Klan member but had encountered the Klan and other racists. The charge of racism against Atticus is not unanswerable. Indeed, it is answered in *Go Set A Watchman* by Atticus's brother, Jack. Part of the point back in the 1990s was to challenge students to write a chapter in a book composed by others, much as judges are writing a chapter in the story of the common law, where earlier chapters were written by others. Partly, it was to encourage students in Northern Ireland to walk in someone else's shoes, to see the world from someone else's porch. Partly, it was to build on a shared experience. I would like to think it was one of a host of ideas that contributed in a small way to influencing the mind-sets of a generation of influential people in Northern Ireland. Former students have told me that this was a formative experience which acquired even more meaning twenty-five years later when they could judge their version against not only mine but, more importantly, Harper Lee's. The title *Go Set A Watchman* comes from the Bible and indicates that part of maturing as a person is to develop one's own conscience, not to rely on a father figure or any other hero but to take responsibility for one's own judgment calls.

(9) Eamon: when justice prevails, rather than miscarries, it can be transforming

The converse of a miscarriage of justice, a delivery or perhaps a carriage, has its own impact: the unheralded humanity and dignity, under pressure, of a just decision has the power to transform individuals, communities and society. The starting point here is a judge keeping an open mind under intense pressure. Even some of the enemies of the state can end up respecting the open-mindedness of the judiciary. I admired the courage, integrity and independence of Mr Justice Higgins and wrote his obituary for *The Guardian*,³² when he died in 1993. But four years later, a more powerful tribute came from a convicted murderer, IRA man, Open University and Queen's law student, Eamon Collins, who was himself later murdered by the IRA. He was tried by Mr Justice Higgins, acting as judge and jury in a Diplock Court, who acquitted him in 1987 of another murder charge. Collins had spent two years on remand. Ten years later, he crafted a remarkable tribute to the judge and the rule of law:

'there could be such a thing as the impartial application of the rule of law ... the contrast with our revolutionary justice was extreme... What he was saying was that in his eyes, the prosecution had failed to exclude the reasonable possibility that I had been treated in such a way as to constitute inhuman or degrading treatment. So even though he suspected I was guilty as hell, he was willing to let me walk free ... I could feel nothing but admiration for this judge who, on such a fragile legal abstraction, had set free a

³¹ Simon Lee, 'Lawyers were children once' in Simon Lee & Marie Fox, *Learning Legal Skills*, Blackstone, 2nd edition, 1994, 304-305.

³² Simon Lee, 'Justice without fear or favour', *The Guardian*, 7 September, 1993.

man from an organization which even during the trial had tried to murder him by firing a rocket at his home.³³

This was despite the fact that Eamon Collins himself believed that 'ordinary' people on the Clapham omnibus 'would probably have liked to have seen me hung, drawn and quartered, with my entrails fed to rabid dogs, and my head stuck on a pike for public edification'.³⁴ No wonder, then, that Eamon Collins explained that, 'the judge's words had sent a real shock through my body. I felt peculiarly emotional about them'.³⁵

(10) Jennie: consider an experiment in prejudices

One of the principal founders of the Open University was Jennie Lee MP, the minister given responsibility by the Prime Minister Harold Wilson in the 1960s for making a 'University of the Air' happen. In the 1920s, as a student at Edinburgh, she had conducted what she called 'An Experiment in Prejudices'. She gave all her student notebooks to the Open University. The OU's archivist, Ruth Cammies, had helped me in the preparation of my inaugural lecture in 2017 and, knowing of my interest in institutional history, mentioned to me that this archive existed. I read through all the hand-written student notes deposited by Jennie Lee and asked permission to publish her account of a student project she undertook in Psychology. This was run in our Year of 'My-gration', a sequence of 250 blogs in 2018, which was, as far as I am aware, the first time that her account of this particular experiment has been made public.³⁶ Her analogy of the mental and physical well-being and education of children has a particular resonance in 2020, given the Covid 19 pandemic and the dramatic actions, including lockdown and the closure of schools, taken to protect children and adults. For Jennie Lee believed that:

'if poverty and war are to be abolished, the schools must make it their duty to search for and destroy harmful anti-social germs in the mind of children as rigorously as disease germs are removed from their bodies...I carried out an experiment with five groups of children, averaging forty-five in each group. They were selected from schools in varied environments, a rural area, a small town, a large town, a mining village and an aerodrome centre. The children were given a list of the nations of the world and asked to write opposite each country whether they liked, disliked, or were indifferent to its inhabitants, and WHY.'

Jennie Lee conceded that, 'Such an experiment takes no claim to scientific thoroughness' but concluded:

'what an indictment of our educational system that only two out of two hundred and twenty two children had learned to do their own thinking and to reply in most cases that they had no opinion as they did not know enough to form one.'

Jennie Lee was studying Law and Education, as well as Psychology. An undergraduate project in one of her three subjects over ninety years ago could not be expected to satisfy the standards of a major research project today but the spirit of her inquiry and the basis of her concern, arising out of reading the latest literature available to her, has much to commend it. Her initiative reflects her character, the breadth of her outlook and her passion for countering prejudice through education, all of which stood her and us in good stead when she led the creation of the Open University.

³³ Eamon Collins, *Killing Rage*, (Granta, 1998) 339-341

³⁴ *ibid* 340

³⁵ *ibid* 339

³⁶ http://www.open.ac.uk/research/news/day-4-year-mygration_

3. Conclusion: a never-ending striving to be open-minded

These first fifty years of the Open University are not, of course, the beginning or the end of understanding an open-minded approach to law and to life. Nevertheless, there was a kind of genius in the origins of the Open University, in more than one sense. The first Chancellor, Lord Crowther, famously said that the University should be 'open to people, places, methods and ideas'.³⁷ It was the most imaginative and pioneering of new universities, with the most imaginative and pioneering approaches to widening access and lifelong learning. The government that brought us the Open University was the same one, led by Harold Wilson, that was so criticised by one of its own backbenchers, Desmond Donnelly, with whose story this essay began and which gave rise to the Megarry observation about open and shut cases.

A contender for the accolade of the most open-minded lawyer or politician or public figure of the twentieth century in this country would be the Lord Chancellor in that Wilson government, Gerald Gardiner. He fought in the First World War but was a conscientious objector in the Second, when he served with a Friends' Ambulance Unit (although not a Quaker himself). In the early 1950s, he successfully represented Jennie Lee and Michael Foot in the House of Lords in a libel action brought by Lord Kemsley against Tribune newspaper³⁸ and, most famously, in the early 1960s he successfully defended Penguin's publishing of Lady Chatterley's Lover in the courts. As a radical Lord Chancellor, he established the Law Commissions and led the Practice Statement declaring a change in our highest court's approach to precedent.³⁹ He brings us back to the cases of Bob and F E who are not the only people to have reached high office in law or politics after finding themselves in trouble with the authorities as students. Gerald Gardiner had graduated from Oxford with Fourth Class Honours in Law, just after the First World War, before achieving the rare feat for a postgraduate student of being expelled.⁴⁰ He was summoned by the Vice-Chancellor, Lewis R Farnell⁴¹, and summarily dismissed for having published a pamphlet by a recent graduate. Her essay was critical of women's colleges for being restrictive. The principals of the women's colleges were indignant and Gardiner was punished. Dilys Powell, the author, went on to become one of our foremost film critics and an expert witness for the defence in that Lady Chatterley's Lover trial. Women's colleges, Gerald Gardiner and universities went on to become more liberal, more open, more imaginative. What did Lord Gardiner do in retirement, while being Chancellor of the Open University? He enrolled as an undergraduate student.⁴² In the inaugural lecture from which this essay is derived, I gave Lord Gardiner the last word, by playing a video of him recalling that he had told the Wilson Cabinet that the Open University would be remembered as their government's greatest achievement. That government opened our minds directly through the Open University and indirectly with the stimulus the OU gave to other universities and to people everywhere to find new ways to learn at all stages of life. For students, including researchers, of the law, this means we have to be open to other disciplines and people who think differently to us, open to going out into places where the path of the law has rarely strayed, to seek to understand the perspectives of the marginalised, no longer voteless but still voiceless, or at least only heard uneasily when they burst through our sound-proofed bubbles.

³⁷ OU archives, Year of My-gration, 2018, http://www.open.ac.uk/research/news/day-4-year-mygration_

³⁸ Kemsley v Foot & Another 1952 AC 345 http://www.uniset.ca/other/cs3/1952AC345.html_

³⁹ [1966] 1 WLR 1234.

⁴⁰ Muriel Box, *Rebel Advocate* (Victor Gollancz, 1983) 42.

⁴¹ L R Farnell, *An Oxonian Looks Back* (Hopkinson, 1934), records with some pride some other illiberal tendencies in his leadership roles but even he is not beyond redemption. He once saw and praised an illiterate tram conductor in Germany who recognised and treated kindly a Nobel Prize-winning Roman lawyer, Mommsen. Farnell recognised a genius in more than one sense here, a respect for lifelong learning in the German people.

⁴² Box, *ibid* 214, graduating in Social Sciences in 1977.

I learned at Yale Law School that any argument is but one view of the cathedral.⁴³ That allusion is to Monet's studies of the Cathedral at Rouen. Monet chose different times and seasons to capture the atmosphere differently, though he painted from the same vantage-point. If we imagine painters all around the cathedral or all around the metaphorical public square, each impression tells us something about the ostensible object but also something about the perspective of the artist and the atmosphere in between the two. For example, whether we are painting a picture of a cathedral or of the law or of politics, the view can be very different from the left or the right. The whole story cannot be discovered from the outside. We need to explore the life and purposes of a cathedral from the inside in order to understand it.

One of the things law does is to provide a focus, a subject to paint, rooting our discussion of high-minded values in particular, often low-level sets of facts, usually with a need for a decision one way or another. So why does law capture our attention? Part of it is to do, of course, with the authority of the law, its combination of moral stance and the coercive power of the state. But it is also partly to do with its drama and its ability to distil some abstract issue into a practical question, usually in the context of a specific dispute, a case wending its way through the courts. The media love the opportunities given by sport, court cases and parliamentary votes to speculate on who will win, to report on what happens and then to analyse why people won or lost. There is a danger in all this of legal fetishism, that we become fixated on the law as a false target. Similarly, the underlying danger of the 'open and shut' attitude is that we become fixated on our initial hunch and are reluctant to hear alternative explanations of an issue.

Challenging such closed-mindedness is not the preserve of the Open University or of the last half-century. For example, Francis Bacon's critique of received wisdom, written in 1620, identified four false idols, giving them names which could sound fresh in a 2020 business school tract on marketing and leadership, the idols of the Tribe, the Cave, the Marketplace and the Theatre. Bacon was writing in Latin but an English translation of his point against what might now be called groupthink or confirmation bias (the first half of XLVI) runs thus⁴⁴:

'The human understanding when it has once adopted an opinion (either as being the received opinion or as being agreeable to itself) draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects and despises, or else by some distinction sets aside and rejects, in order that by this great and pernicious predetermination the authority of its former conclusions may remain inviolate.'

Each age needs to have this emphasised in its own way. Forty years after Bacon, Matthew Hale, later Chief Justice, wrote '*Things Necessary to be Continually had in Remembrance*', rules or reminders to himself on his initial appointment to the Bench in 1660:⁴⁵

'That in the execution of justice, I carefully lay aside my own passions, and not give way to them however provoked.
That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard.
That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard...
That I be not biased with compassion to the poor, or favour to the rich in point of justice.
That popular or court applause or distaste, have no influence into any thing I do in point of distribution of justice.'

⁴³ G Calabresi and A. Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089.

⁴⁴ F Bacon, *Novum Organum*, 1620.

⁴⁵ Matthew Hale, *Things Necessary to be had Continually in Remembrance*, 1660, reprinted eg by Merrymount Press, 1937 and quoted eg in Tom Bingham, *The Rule of Law*, (Penguin 2010).

Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice.'

To have these things 'continually' in mind is a challenge. As Bowen & Bok conclude their examination of race in American universities and society, 'The "river" that is the subject of this book can never be "learned" once and for all'⁴⁶, referring to Twain's realisation that the great river had to be learned upstream and downstream. So striving to live out Megarry's call to open-mindedness is an unending task. Every day, we can find further examples of seemingly 'open and shut cases which, somehow, were not'.

Just as Hale was putting the spirit of Bacon into reminders to himself, Megarry was consciously echoing Holmes from seventy years before. Very few people now read through to the conclusion of Holmes' lecture on *The Path of the Law* but it ends with this affirmation of a quirky and abstract collection of incidents:⁴⁷

'The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.'

⁴⁶ William G Bowen & Derek Bok, *The Shape of the River*, (Princeton University Press, 1998).

⁴⁷ n11 above, 478.

Thoughts on the Four Nations and Beyond

Chapter 2

Devolution, debate and change: Changing the UK's constitutional settlements

Carol Howells and Edwin Parks

Abstract

Devolution has been 'a process not an event' resulting in new constitutional settlements. This chapter covers the processes of devolution, processes which mirror the first 50 years of the Open University and the first 22 years of the OU Law School. The chapter explores the devolution of powers to parliaments in Scotland and Wales. It begins with the referendums of the early 1970s and traces events leading up to both the initial transfer of powers and those resulting in subsequent transfer of powers. The process has not been without its critics and the use of differing models helped create complexity re-enforcing historical legacies. Devolution created new legal orders and challenged accepted traditional constitutional theory. The story is not yet over.

1. Introduction

The establishment of The Open University (OU) in 1969 changed the landscape of higher education in the United Kingdom (UK). Its mission of being 'Open to people, places, methods and ideas'¹ and its promotion of social justice through high quality education² has challenged thinking around educational practices. In the 50 years since it was established it has transformed the lives of many through its work and partnerships. It has students in over 90% of UK postcodes³ and continues to hold a unique position within the UK's Higher Education sector working across, and receiving funding from, all four UK nations. In celebrating its 50th anniversary its Vice Chancellor expressed pride in being the UK's only four nations university.⁴

During the OU's 50-year history there have been significant changes and challenges within the higher education landscape. These mirrored the significant political, legal and constitutional changes taking place within the UK itself. Changes regarded as unlikely by many fifty years ago have now transformed the educational, legal and political landscapes within the UK. This chapter will focus on one aspect of those changes, the creation of new legislatures within the UK in Scotland and Wales.

¹Mission: About the university< <http://www.open.ac.uk/about/main/strategy-and-policies/mission>> (accessed 9 October 2020).

² Ibid 1.

³ Data from 2019.

⁴ '50. A movement of millions a mission of one' Open University 2019
<<http://www3.open.ac.uk/documents/1/vs19080444243116.pdf>> accessed 9 October 2020.

2. The referendums: Politics as a driver and inhibitor

To provide context this section considers the calls for devolution that re-surfaced and grew in the 1960s. As politicians were considering a 'University of the Air'⁵ they were also making commitments to some form of devolution.⁶ The Welsh Office had been established in 1965 (the year in which planning for the OU began in earnest) and the Northern Ireland Office in 1972 (The Scottish Office had been in existence since 1885). Further, and more significant, plans for change were to follow.

In 1966⁷ and 1967⁸ both the Welsh and Scottish nationalist parties won parliamentary seats in by-elections. By 1969 both parties were gathering momentum and seen as possible contenders for further Labour parliamentary seats in both Wales and Scotland. There were growing successes in local elections too. Disagreement in the Labour Cabinet⁹ as to how to respond to this threat in Labour strongholds grew and led to the establishment of a Royal Commission on the Constitution in 1969. The Commission's remit was broad and included examining various structures of the constitution including local government administration. It considered, amongst other matters, devolution, federalism¹⁰ and the possible division of the UK into separate sovereign states. The work took some four and a half years to complete¹¹ and the final report was not unanimous. Several commissioners published their own views under a Memorandum of Dissent. Independence or federalism was rejected in favour of elected devolved assemblies. The Memorandum of Dissent reflected the disagreements over both the terms of reference and interpretation of the evidence gathered.¹²

In a parliamentary debate on the Royal Commission on the Constitution in 1973 Lord Beaumont of Whitley noted:

Now that the debate over Europe is, with due respect [...] more or less over, this debate and subject will become more and more important and will be the main constitutional one in forthcoming years.¹³

He went on:

Our position is simple: we agreed with the analysis contained in the Majority Report to the extent that: 'Government is remote and insufficiently sensitive to the views and feelings of the people.' [...] we endorse the belief expressed [...] in their Memorandum of Dissent when they say that the necessary reforms should have three main objectives: first, to counter the decline they consider has taken place this century in the extent to which the British people govern themselves; secondly, to reduce the

⁵ See <<https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/collections1/parliament-and-the-1960s/jennie-lee/>> accessed 9 October 2020.

⁶ Edward Heath 'Declaration of Perth' 1968 in which the Conservative party committed to Scottish devolution. This was followed in 1970 by a report led by Sir Alec Douglas-Home, then Foreign Secretary, recommending the creation of a Scottish Assembly.

⁷ Gwynfor Evans MP first Plaid Cymru MP. Elected to represent the Carmarthen constituency.

⁸ Winnie Ewing SNP to represent the Hamilton constituency. In local elections the same year the SNP gained 69 seats. In local elections in 1968 the SNP gained 40% of the vote.

⁹ Harold Wilson became UK Prime Minister on 16 October 1964. Following a general election in 1966 he held power until 1970. Elected in 1953 to the Huyton constituency as a Labour MP having previously held the seat of Ormskirk. Harold Wilson is associated with the establishment of the Open University. The Open University represents the realisation of his plans for a 'University of the Air' outlined in the mid 1960s.

¹⁰ The Royal Commission on the Constitution 1969 also considered the UK's economic and constitutional relationships with the Isle of Man and Channel Islands.

¹¹ The first chair Lord Crowther died in 1972 and Lord Kilbrandon took over. The report is also referred to as the Crowther and Kilbrandon Report.

¹² Royal Commission on the Constitution: Papers and Evidence: the National Archives <<https://discovery.nationalarchives.gov.uk/details/r/C9085>> accessed 9 October 2020.

¹³ HL Deb 12 December 1973 vol 347 cols 1157-76.

present excessive burdens on the institutions of Central Government; thirdly, to provide adequate means for the redress of individual grievances.¹⁴

By the time the report was published a Conservative government¹⁵ was in power. In 1974¹⁶ a White Paper 'Democracy and Devolution: proposals for Scotland and Wales'¹⁷ was published. The paper proposed handing over certain governmental and administrative powers to directly elected Assemblies for Scotland and Wales, with the Scottish Assembly having legislative but not tax-raising powers and the Welsh Assembly having executive powers only. A further report followed in 1975, 'Our Changing Democracy: Devolution to Scotland and Wales'.¹⁸ In their response to this paper the Scottish Law Commission noted:

'much depends upon the precise way in which the devolved and retained matters are specified, but it is clear that any system which envisages the specification of both will enhance the difficulty of ascertaining the precise scope of the devolved powers [...] it follows that there will be room for considerable uncertainty as to scope, and difference of opinion depending on whether the matter is viewed from an English or from a Scottish standpoint.'¹⁹

By 1974 both the Labour and Conservative parties were making commitments in their manifestos²⁰ to a Scottish Assembly and powers to spend a share of the UK's budget.²¹ Labour promised to also create an elected Assembly in Wales.

In 1976 a Scotland and Wales Bill was published.²² During the second parliamentary reading in the House of Commons the Prime Minister, James Callaghan, noted:

I doubt whether any major measure has come before the House after such extensive discussion, certainly not in recent years. That is as it should be in the case of a constitutional measure of such great scope and lasting importance. This is a measure for Wales and Scotland and a measure for preserving the unity of the United Kingdom.

[...]

We do this because we believe the people of Scotland and of Wales look to Parliament to reach a definite conclusion on the Bill and not just to allow it to be filibustered into oblivion. Now that the Government have placed the Bill before Parliament, Scotland and Wales are entitled to a clear verdict and not just an interminable and never-ending flow of argument.

The parliamentary debate on the Bill will be one of great constitutional importance.

[...]

¹⁴ HL Deb 12 December 1973 vol 347 col 1159.

¹⁵ A Conservative government under Edward Heath had come to power in June 1970.

¹⁶ The February election of 1974 was won by a Labour majority of 4 seats. Labour became a minority government. In an October election the same year they held on to power with a majority of 3 seats.

¹⁷ Democracy and Devolution: proposals for Scotland and Wales: the national Archives
<<https://discovery.nationalarchives.gov.uk/details/r/C3081357>> accessed 9 October 2020.

¹⁸ Our Changing Democracy: Devolution to Scotland and Wales: the National Archives
<<https://discovery.nationalarchives.gov.uk/details/r/C11121883>> accessed 9 October 2020.

¹⁹ Scottish Law Commission Memorandum No. 32 Comments on White Paper 'Our Changing Democracy: Devolution to Scotland and Wales' para 6. These concerns continue to also have resonance today.

²⁰ Each published separate manifestos for Scotland and Wales.

²¹ 'Putting Britain First' 1974 Conservative manifesto and 'Britain will win with Labour' 1974 Labour manifesto.

²² HC Deb 13, 14 and 15 December 1978 Vol, 922, col 974-1150, col 1249-1486, col 1559-1661, col 1735-1876.

The purpose of the Bill, therefore, is to give the Scottish and Welsh people a surer guarantee and a more relevant instrument of national identity.²³

The second reading was made possible by a concession, an agreement that referendums would be held in the nations of Scotland and Wales. Significant parliamentary time had been allowed for the debates, but the bill faced fierce opposition and failed to get through all necessary parliamentary stages. The hopes that it would not be 'filibustered into oblivion' proved fruitless.²⁴ It was a blow to those seeking to more fully recognise the diversity of the UK and highlighted the significant political differences that existed. Devolution and the politics associated with it were fracturing existing political party politics, crossing boundaries and alliances. Similarities can be drawn with debates over European Union (EU) membership. Constitutional debates in the UK appear to sit uncomfortably in the arena of politics.

Following swiftly on from the 1976 defeat further legislation was introduced and in 1978 both the Scotland Act and the Wales Act²⁵ were passed. Differing devolution settlements had always been proposed for Scotland and Wales but at this stage a new approach of separate legislation was adopted. That approach began the process which created an unequal public understanding. One that lasted well into the second decade of the next century.

The bills were both introduced in November 1977. They progressed together through the parliamentary approvals process receiving Royal Assent in July 1978.²⁶ However, throughout the debates and progress of the bills the Scottish Bill was always placed first in debates.²⁷ Whilst there was widespread coverage of the Scotland Bill there was minimal coverage of the Wales Bill outside Wales.²⁸ Coverage also often concentrated on the political issues and debates as new alliances were created and MPs worked together in new partnerships to either support or defeat²⁹ the bills. The different provisions for devolution, including the differing character of the settlement proposed for Wales compared to Scotland were not widely appreciated or understood. This approach laid the groundwork for subsequent proposals creating a form of unintentional bias and perpetuating both State and political behaviour.

The Scotland and the Wales Acts received Royal Assent in 1978 but could only become law if voted for by a majority of voters in Wales and Scotland. Referendums³⁰ were held on 1 March 1979. A small majority of Scots voted 'Yes'³¹ but only a minority voted 'Yes'³² in Wales. In each case the 40% threshold imposed was not met. The result had significant and long-term political implications for the UK³³ and the Scotland Act and the Wales Act were repealed in June 1997 by Order in Council³⁴. What had started as an intention to recognise the diversity and history of the UK, to protect the Union and safeguard votes had led to division, an upending of traditional party politics and growing nationalism. Negotiating constitutional

²³ HC Deb 13 December 1976 vol 922, col 975.

²⁴ The Government had to abandon the Bill when it failed to survive a guillotine motion (45 Labour MPs abstained).

²⁵ HC Deb 14 November 1977 Vol 939, col 51-214, 1978 Wales Act and Scotland Act 1978.

²⁶ HC Deb 25 January 1978 vol, 942, col 1424-1553 at 1543. At committee stage an amendment from Labour backbencher George Cunningham was introduced. This required the Secretary of State to lay before Parliament an order repealing the Act unless at least 40% of the eligible electorate voted "yes". The amendment was approved by 166 votes to 151.

²⁷ eg HC Deb 26 July 1977 vol 936, col 313-28 Mr Cledwyn Hughes at 317 and response at 318.

²⁸ London based press dominated the debate. They outsold local newspapers in Wales by around 7:1. The debate was not widely communicated to the Welsh electorate either.

²⁹ See eg the press coverage of the 'gang of six' Welsh Labour MPs who opposed devolution.

³⁰ HL Deb 21 July 1997 vol 581, col 1240-74 at 1245. These were advisory referendums.

³¹ Turnout was 63.3%. 32.9 % voted 'Yes', 30.8 % voted 'No'.

³² Turnout was 58.8%. 20.3 % voted 'Yes' 79.7% 'No'.

³³ HC Deb 28 March 1979 vol, 965 col 461-590 at 461 and 584. The Labour Government lost the no confidence vote by one vote. In May 1979 a Conservative Government was elected. The Conservatives held power for the next 18 years.

³⁴ Wales Act 1978 (Repeal) Order 1979. Scotland Act 1978 (Repeal) Order 1979.

change presented challenges for every political party.³⁵ The traditional centralised Westminster model was being challenged in ways not seen before. A position not helped by the role of the Westminster Parliament³⁶ as both State-wide and Nations legislature.

The referendums in 1979 were not the end of the matter. Changes again began to be called for in the 1980s and 1990s as the pattern of political support in Scotland and Wales³⁷ began to differ significantly from England. These calls were recognised in the Labour Party manifesto for the 1997 election, which contained a commitment to hold a referendum on devolution in Scotland, Wales and Northern Ireland.³⁸ The Labour Government³⁹ published a White Paper, 'A Voice for Wales'⁴⁰ and 'Scotland's Parliament'⁴¹ in July of the same year. The white papers outlined proposals for a devolved Assembly in Wales and a Scottish Parliament. Referendums were held in Wales and Scotland on 18 September 1997.

In the House of Lords debates Lord Sewel, Parliamentary Under-Secretary of State for the Scottish Office, noted:

As someone who was born and brought up in England, pursued part of my education in Wales and has lived most of my life in Scotland—I value the Union. But the enduring value of the Union is its diversity. What we are doing is to establish structures of government that not only recognise that diversity but encourage it to flourish.

I have said that our proposals are about revitalising democracy. We want to revitalise democracy in Scotland and Wales. We want a new politics—a more inclusive, consensual politics. That is why we have devised an electoral system that will ensure the fair representation of different points of view. That is why we place great emphasis on a strong committee system and ideas like pre-legislative scrutiny.

While many of us enjoy the theatre of this House and of Parliament generally, we must recognise that many of our fellow citizens are deterred from making a contribution to public life by the adversarial and confrontational style of our politics⁴². We want to change that. We want a parliament and an assembly in which a much wider range of people will wish to participate. And I say quite frankly that that is going to be a challenge to the political parties and their selection processes, but we need it. The two countries—the UK—need a change in their approach to politics. It needs a more inclusive legislature.⁴³

The emphasis in the devolution debates was now refocused on political change, democracy and strong pre-legislative scrutiny. The bills were debated at the same time and passed through the parliamentary process in tandem.⁴⁴

³⁵ See also the 1975 UK wide referendum on membership of the European Community.

³⁶ Referred to here as the Westminster Parliament. The Royal and Parliamentary Titles Act 1927 section 2(1) gives the full title as the Parliament of the United Kingdom of Great Britain and Northern Ireland. Throughout these referendums and during the 'Troubles' the position of Northern Ireland received less attention in constitutional debates despite the 1973 referendum on Northern Ireland sovereignty.

³⁷ The combination of the policies of the UK Conservative Government in the 1980s and the Conservative Party's low levels of electoral support in Wales led to renewed calls for Wales to have its own legislature.

³⁸ 'Devolution: Strengthening our Union' 1997 Labour Party manifesto.

³⁹ The Labour Party won the general election with a majority of 179. Share of votes: Labour 45%, Conservative 31%, Liberal Democrat 17% and other 7%. In Scotland the SNP polled a 22% share of the vote in Scotland and Plaid Cymru a 10% share in Wales.

⁴⁰ A Voice for Wales- the Government's Proposal for a Welsh Assembly (Cm 3718, 1977)

⁴¹ Scotland's Parliament (Cm 3658, 1977)

⁴² This remains in evidence at the UK's Prime Ministers Question Time.

⁴³ HL Deb 30 Jul 1997 vol 582, col 186.

⁴⁴ Alongside the Northern Ireland Bill which followed the 1998 Belfast Agreement.

As an aside, as it touches upon matters of devolved competencies, in the same debate Lord Sewel also noted:

There have been a number of questions about our proposals for giving the Scottish parliament and the Welsh assembly a say in European Union affairs. The Scottish executive and parliament and the Welsh assembly will have important roles in relation to European Union issues. Both will have the fullest and most direct possible involvement in policy formation within the United Kingdom. The Scottish and Welsh voices must be heard in relevant negotiations on policy at all levels, up to and including the Council of Ministers, including the scope to speak directly on behalf of the UK in those negotiations.⁴⁵

Evidence from recent years is that this commitment to full involvement has yet to be realised.⁴⁶

In Scotland turnout for the referendum was 60.2 per cent. A majority (74.3 per cent of those who voted) supported devolution. A further 63.5 per cent voted for tax-varying powers⁴⁷. In Wales turnout for the referendum was 50.1 per cent. A small majority (50.3 per cent of those who voted) supported devolution. Because no thresholds had been stipulated, a simple majority vote was all that was required to give a mandate for devolution.

The process of devolution began and in 1999 new legislatures in Scotland and Wales were established.⁴⁸ Despite the emphasis at the time on democracy and political change the move to devolved powers in three of the four UK nations has led to significant constitutional implications. The constitutional statutes creating the new legislatures, and the subsequent amendments, have challenged notions of the 'English' constitution written about by Bagehot, Dicey and Bingham.⁴⁹

The referendum results themselves did not lead to the breakup of the Union so feared by many politicians but they were of their time and the subsequent referendum on EU membership⁵⁰ has not only changed the UK's political landscape even further but has also changed opinions around the devolved settlements and the future shape of the UK itself.

3. Devolution: Scotland

The Scotland Act 1998 established the Scottish Parliament and outlined the law-making process, as well as on what matters laws can be made. The Scottish Parliament has full legislative competence⁵¹ (it can pass both primary and subordinate legislation) in devolved areas.

Devolution took the form of a reserved powers model; Schedule 5 contained a list of 'reserved matters'.⁵² These were matters which were to be reserved for the UK Parliament⁵³ and on which only the UK Parliament could make law. There was, however, no similar list of devolved

⁴⁵ HL Deb 30 July 1997 vol 582, col 188.

⁴⁶ In particular around negotiations with the EU as international policy is a reserved matter. Many EU policies however touch on matters which are devolved and over which the Nation governments have exclusive competence.

⁴⁷ This question was not included on the Wales ballot in 1997.

⁴⁸ Also, in Northern Ireland

⁴⁹ Walter Bagehot 'The English Constitution' (London: Chapman and Hall, 1867), Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (MacMillan, 1885), Tom Bingham, *The Rule of Law* (Penguin 2010).

⁵⁰ 23 June 2016. England 53.4% leave 46.6% remain. Scotland 38% leave 62% remain. Wales 52.5% leave 47.5% remain. Northern Ireland 44.2% leave 55.8% remain. UK overall 51.9% leave 48.1% remain.

⁵¹ s29 Scotland Act 1998 as amended.

⁵² Schedule 5 Scotland Act 1998 as amended.

⁵³ From this point in the chapter the Westminster Parliament will be referred to as the UK Parliament as an indicator of its reserved powers across the UK and to distinguish it from the Scottish and Welsh Parliaments.

matters on which the Scottish Parliament could legislate. Matters on which the Scottish Parliament can legislate are, in effect, all those matters that are not 'reserved'.

The Scotland Act 1998 was the beginning and devolution in Scotland has not stood still. It has been an evolving process, and one which, at times, has been a direct political response from the UK Government to changes in both Scottish society and politics.⁵⁴

The third elections to the Scottish Parliament were held in 2007. For the first time the SNP held more seats than Labour.⁵⁵ In August 2007, the Scottish Government published 'Choosing Scotland's future: a national conversation: independence and responsibility in the modern world'.⁵⁶ The purpose was to promote 'conversation' on Scotland's constitutional future, a discussion around possible independence amongst other matters. One outcome was the unification of the opposition parties within the Scottish Parliament. The leaders of the three opposition parties issued a joint statement opposing any plans for an independence referendum.⁵⁷

Within Scotland public awareness of the work of the Scottish Parliament was high. Its work had proved popular within Scotland and it had the ability to respond to local and national issues. A number of its legislative provisions led the way for other UK legislatures.⁵⁸ Transparency and public engagement were at the core of its work.⁵⁹ This, together with a changing political landscape led, in 2007, to an agreed review. In December 2007, in a parliamentary debate⁶⁰ around the agenda for the future of Scotland, it was noted:

That the Parliament, recognising mainstream public opinion in Scotland, supports the establishment of an independently chaired commission to review devolution in Scotland; encourages UK Parliamentarians and parties to support this commission also and proposes that the remit of this commission should be: To review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to better serve the people of Scotland, that would improve the financial accountability of the Scottish Parliament and that would continue to secure the position of Scotland within the United Kingdom, and further instructs the Scottish Parliamentary Corporate Body to allocate appropriate resources and funding for this review.⁶¹

The Conservative Party leader noted:

Strengthening devolution while continuing to secure the position of Scotland within the United Kingdom is not just an honourable but a highly important commitment. It is bigger than any one political party, because it dwarfs party politics. We are talking about shaping the constitutional direction of travel of our nation for the future, not just because it is sensible and pragmatic to do that eight years on, but because it overwhelmingly reflects what Scotland wants to happen.⁶²

⁵⁴ As a response to the referendum on Scottish independence held in September 2014.

⁵⁵ SNP 47 seats, Scottish Labour Party 46 seats, Scottish Conservative Party 17 seats, Scottish Liberal Democrats 16 seats. The SNP formed a minority government. Alex Salmond was appointed as First Minister.

⁵⁶ Scottish Government 'Choosing Scotland's Future: A National Conversation: Independence and Responsibility in the Modern World' 2007.

⁵⁷ See BBC 13 August 2007 < <http://news.bbc.co.uk/1/hi/scotland/6944185.stm> > accessed 9 October 2020.

⁵⁸ See for eg on health and social care, environment, alcohol minimum pricing, period products in schools.

⁵⁹ This includes public engagement and legislative consultations across Scotland, a five-star tourism award, events and annual awards.

⁶⁰ SP OR 6 December 2007, col 1. S3M-976 was moved by the Labour leader in the Scottish Parliament, Wendy Alexander. Motion agreed: For 76, Against 46, Abstentions 3.

⁶¹ SP OR 6 December 2007 cols 4133-85.

⁶² Ibid col 4143.

The Commission on Scottish Devolution⁶³ (The Calman Commission⁶⁴) was supported by the UK Parliament and formally announced by the Secretary of State for Scotland, Des Browne.⁶⁵

The Government welcome that Parliament's support for the aim of strengthening devolution and securing Scotland's place in the Union. We are therefore giving our full support to this cross-border, cross-party review.

The remit of the Calman Commission was to:

review the provisions of the Scotland Act 1998 in light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament, and continue to secure the position of Scotland within the UK.⁶⁶

The remit had not gone far enough for everyone though as Scottish independence had not been included:

Although we welcome any contribution to the national conversation, we regret that the Parliament has agreed to establish a commission that deliberately excludes independence—not just the favoured option of the largest party in the Parliament, but the favoured option of a substantial proportion of the Scottish people.⁶⁷

Following wide-ranging consultations, the Commission made a number of recommendations in its final report.⁶⁸ Recommendations were made in relation to fiscal autonomy, further devolution of powers, improvements to intergovernmental relations (IGR) and the legislative processes of the Scottish Parliament. It saw devolution as a success that could be built on.

In the UK Government's response 'Scotland's Future in the United Kingdom. Building on ten years of Scottish devolution' Gordon Brown noted:

The Scottish Parliament and the other devolved legislatures are now firmly entrenched in the United Kingdom's constitution. They help to make that constitution one fit for the 21st century. But there is more reform and modernisation to come. The plans in this White Paper are an important part of that.⁶⁹

Acknowledgement of the changes within the UK's constitution was being made and the role played by devolution becoming more widely recognised. Focus had, for the time being, moved from the politics. In a Westminster Hall debate on the Scotland Act 1998 in April 2008 it was noted:

Everyone in this Chamber agreed that more powers are required for the Scottish Parliament. Who would have believed that the Conservative, Liberal, Scottish National and Labour parties would now demand more powers for the Scottish Parliament? It is

⁶³ Commission on Scottish Devolution 'The future of Scottish devolution within the Union: a first report' December 2008 and final report 'Serving Scotland Better: Scotland and the United Kingdom in the 21st Century' 2009.

⁶⁴ Known by this abbreviation the Commission was chaired by Professor Sir Kenneth Calman.

⁶⁵ HC 25 Mar 2008: Col 7WS.

⁶⁶ Ibid 63 and HC 25 Mar 2008: Col 8WS. The terms of reference mirrored the motion approved by the Scottish Parliament December 2007.

⁶⁷ SP EU 11 December 2007 The Deputy First Minister, Nicola Sturgeon.

⁶⁸ Ibid 63.

⁶⁹ Scotland Office 'Scotland's Future in the United Kingdom: Building on ten years of Scottish devolution' (CM 7738, 2009).

remarkable, and we should take a moment to appreciate its full significance and importance. [...] Now everyone is talking.⁷⁰

The UK Government's commitment to implementing the Calman report resulted in The Scotland Act 2012. This made several changes to the devolution settlement for Scotland. These included the renaming of the Scottish Executive as the Scottish Government,⁷¹ Paragraph 8 of the explanatory notes to the 2012 Act state that:

As the Act changes the devolution settlement for Scotland, the Act contains provisions which alter the legislative competence of the Scottish Parliament (for example, relating to air weapons) and provisions which alter the executive competence of the Scottish Ministers (for example, relating to the power to prescribe drink-driving limits). The Scottish Parliament gave its consent to the provisions in the Act that trigger the Sewel Convention on 18 April 2012.⁷²

In the 2011 elections the SNP achieved a majority⁷³ in the Scottish Parliament and the question of independence once more became a focus. As the 'constitution' was a reserved matter there were questions as to who had power to call and hold a referendum. A solution needed to be found and the Edinburgh Agreement⁷⁴ reached in 2012 made provision for a referendum. An Order in Council approved by both Houses of the UK Parliament and the Privy Council gave the Scottish Parliament powers to hold, on or before 31 December 2014, an independence referendum.⁷⁵

A Scottish Referendum Bill⁷⁶ was presented to the Scottish Parliament and received Royal Assent in December 2013. The electoral franchise was extended, and 16 years olds were able to vote in a Scottish referendum for the first time⁷⁷. The referendum was announced in March 2013 and held in September 2014. Fierce campaigning took place, particularly during the later stages of the campaign. The UK Government made several commitments to extend the powers of the Scottish Parliament in an aim to cement the Union. Two days before the referendum a statement signed jointly by David Cameron, Nick Clegg and Ed Miliband⁷⁸ promised voters 'permanent and extensive new powers' and that the Scottish Parliament would have a say in how much was spent on the NHS in Scotland.⁷⁹

Whilst there were debates over a proposed independence date the referendum result was in favour of staying within the UK. In a turnout of 86.4 per cent the vote 55.3 per cent voted no and 44.7 per cent yes. Immediately following the referendum Lord Smith of Kelvin was tasked with overseeing and delivering a cross-party agreement on the shape of improved and enhanced devolution for Scotland.

⁷⁰ HC Deb 2 Apr 2008: Column 270WH. Pete Wishart MP Shadow SNP Spokesperson (Cabinet Office).

⁷¹ S 12 2012 Scotland Act. See also associated legislative consent motion S4M-02625: Lodged: 16 April 2012 Debated 18 April 2012.

⁷² See <<https://www.legislation.gov.uk/ukpga/2012/11/notes/division/2>> accessed 9 October 2020.

⁷³ SNP 69, Scottish Labour Party 37, Scottish Conservatives 15, Scottish Liberal Democrats 5, Scottish Green Party 2, Independent 1.

⁷⁴ HM Government and the Scottish Government 'Agreement between the United Kingdom Government and the Scottish Government on an Independence Referendum for Scotland'. Signed 15 October 2012.

⁷⁵ The Scotland Act 1998 (Modification of Schedule 5) Order 2013

⁷⁶ See <<https://www.parliament.scot/parliamentarybusiness/Bills/61076.aspx>> and <<https://www.parliament.scot/parliamentarybusiness/Bills/60464.aspx>> both accessed 9 October 2020.

⁷⁷ Forming part of wider SNP policy this was widely supported by other political parties including Labour, the Liberal Democrats and Green party.

⁷⁸ Leaders of the UK Conservative Party, Liberal Democrats and Labour Party respectively.

⁷⁹ Opinion is divided as to whether the promises were delivered see eg <https://www.channel4.com/news/factcheck/factcheck-qa-westminster-broken-promise-scotland> accessed 9 October 2020.

The 'Report of the Smith Commission for further devolution of powers to the Scottish Parliament'.⁸⁰ was delivered in November 2014. In his forward Lord Smith noted:

This agreement is, in itself, an unprecedented achievement. It demanded compromise from all of the parties. In some cases that meant moving to devolve greater powers than they had previously committed to, while for other parties it meant accepting the outcome would fall short of their ultimate ambitions. It shows that, however difficult, our political leaders can come together, work together, and reach agreement with one another.⁸¹

The report had been agreed by all five of the main Scottish political parties and outlined further powers for the Scottish Parliament. In carrying out his work Lord Smith had 'sought to give a voice to the public and the various organisations that make up the fabric of Scottish life'.⁸² The Scotland Act 2016 which resulted transferred additional powers to the Scottish Parliament.

The powers of the Scottish Parliament have grown significantly since the original devolution settlement.⁸³ Their growth has been incremental and piecemeal but before moving on it is worth looking back to consider the opinions of those initially tasked with the setting up of the Scottish Parliament. Key features include its openness, transparency of process and proactivity in engaging with the Scottish public. For all this work the Scottish Parliament has received international recognition. In events to mark the 20-year anniversary 'expectation versus reality', Holyrood's original steering group delivered their assessment of the Scottish Parliament at twenty:

World class legislation on, among other things, different approaches to the funding of higher education, climate change, free personal care, the smoking ban, proportional representation in local government elections, land reform and many other areas has more than vindicated the case for a legislative body in Scotland. The Scottish Parliament is now a fundamental and valued aspect of public life in Scotland and both the institution and its Members enjoy high recognition levels among the country's electorate.⁸⁴

The journey of devolution in Scotland is not over. More twists, turns, straight stretches and dead ends lay ahead. With the departure of the UK from the EU it remains unclear how and to whom the exclusive competencies of the devolved legislatures and governments will return. Gains made under devolution may be lost and power concentrated once again at the centre in Westminster. Calls for independence also remain.⁸⁵

Having explored devolution in Scotland, the next section will consider the process in relation to Wales.

⁸⁰ Smith Commission (2014b) 'Report of the Smith Commission for further devolution of powers to the Scottish Parliament'.

⁸¹ Ibid 4. < https://webarchive.nationalarchives.gov.uk/20151202171029/http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf > accessed 9 October 2020.

⁸² Ibid 80.

⁸³ Now often referred to as the most powerful devolved legislature in the world. See eg BBC News Report May 2016 < <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-35716653> > accessed 9 October 2020.

⁸⁴ Consultative Steering Group 'Reflections on 20 years of the Scottish Parliament' 2019. The report also commented on the apparent polarisation of politics see para 4 and 8.

⁸⁵ See Referendums (Scotland) Act 2019 approved December 1999, received Royal Assent January 2020 and eg BBC News January 2020 < <https://www.bbc.co.uk/news/amp/uk-scotland-scotland-politics-51284836> > accessed 9 October 2020.

4. Devolution: Wales

Proposals for devolution in Wales differed significantly from that in Scotland. The UK Government adopted an asymmetrical model for devolution. This difference was justified on several grounds including historical differences and a sense of citizenship⁸⁶. Wales' journey over the past twenty years has been a complex one. This complexity has led, on occasion, to a lack of public engagement and support.⁸⁷ It was the Secretary of State for Wales, Ron Davies, who, in 1997, described devolution as "a process not an event".⁸⁸ No-where has this been truer than in relation to Wales.

The White Paper 'A Voice for Wales' proposed an Assembly of 60 members which would assume most of the former powers of the UK Government's Secretary of State for Wales. These include executive powers, and powers to make law in the form of 'secondary legislation',⁸⁹ where these powers had been granted under an Act of Parliament passed by the UK Parliament. There were no plans for the Assembly⁹⁰ to have primary law-making powers.⁹¹ The model adopted was one of transferred powers⁹² and of executive devolution. This model was derived partly from the precedent of local government, with ministerial functions and powers over secondary legislation belonging to the Assembly.

Following the referendum vote the Government of Wales Act 1998⁹³ provided for the establishment of an Assembly of 60 members⁹⁴. The Welsh Assembly had authority to pass secondary legislation affecting Wales (in specified areas) and executive powers as to how UK laws were implemented in Wales⁹⁵. It could not pass primary legislation or raise taxes, although it was able to debate issues that extended to Wales.

The Welsh Assembly was welcomed by many and several positive outcomes resulted. Public access was greater and an inclusive and consensual rather than divisive style of politics developed. It had achieved the aim of bringing decision making closer to the people. However, there were several challenges that led to calls for further change. The model of a single corporate structure adopted⁹⁶ was problematic with both legislative and ministerial functions in one body.⁹⁷ It differed significantly from the Scottish 'reserved' model. As noted on Law Wales:

⁸⁶ Although by this stage there were few differences between the powers of the Secretary of State for Scotland and the Secretary of State for Wales.

⁸⁷ See, for example, voter turnout.

⁸⁸ Address to the Institute of Welsh Affairs Gregynog Seminar, 9-10 Jan. 1999; 'Datganoli: proses nid achlysur=Devolution: a process not an event' (Gregynog Papers, vol. 2, no. 2), 4 Feb. 1999

⁸⁹ Secondary legislation is traditionally associated with the UK Parliament. In Scotland and Wales, the term subordinate is more commonly used. This is a more descriptive term reflecting the type of legislation. Differing processes and procedures exist in each parliament.

⁹⁰ Unlike Scotland there was a single corporate structure which had its own legal personality. There was no formal division between executive and legislative authority. This raised question around the separation of powers.

⁹¹ Primary legislation is used to describe laws passed by the legislative bodies of the UK e.g. Acts of the UK Parliament, Scottish Parliament, Welsh Parliament and Northern Ireland Assembly. Subordinate legislation or secondary legislation is delegated legislation made by a person or body under authority given by primary legislation.

⁹² The Scottish Parliament was created under a reserved powers model.

⁹³ Assembly for Wales (Transfer of Functions) Order 1999 transferred of powers to the National Assembly.

⁹⁴ Divided into 40 constituency representatives and 20 members for regional seats.

⁹⁵ This could have the important consequence that legislation might be brought into force in Wales but not in England, or vice versa.

⁹⁶ Which arguably had implications for the principle of the rule of law in the UK's constitution and the doctrine of separation of powers where governance is traditionally divided into three branches each with separate and independent powers and responsibilities: an executive, a legislature and a judiciary.

⁹⁷ This settlement did not reflect the devolved settlements in other Nations. Some saw this as re-enforcing traditional attitudes and approaches.

In the early years of devolution many struggled to differentiate between those who exercised power (the cabinet of Ministers appointed by the First Minister as leader of the main political party in the National Assembly) and the National Assembly itself as an institution.

Although a system of delegations of power from the National Assembly to the First Minister and from the First Minister to other Ministers and staff was put in place reflecting a traditional division between an executive and legislature, in practice this system proved difficult to understand and operate.⁹⁸

In 2002, discussions and debates took place that led to a resolution by the Assembly to separate the roles of the executive and legislative as far as was as possible and the term 'Welsh Assembly Government' was introduced to highlight the difference between the work of the Executive, the Cabinet and the Assembly. The debates led to the establishment of an independent commission, the Richards Commission⁹⁹ to consider the powers and electoral arrangements of the Assembly.

The Richards Commission¹⁰⁰ reported in 2004.¹⁰¹ Its recommendations¹⁰² had major implications for the future of devolution in Wales. These included the separation of the legislature and the executive, their establishment as separate legal entities, electoral reform and the suggestion of enhancing the powers of the Assembly so that it operated in a similar way to the Scottish Parliament. It concluded that this would enable the current difficulties to be overcome. Finally, it noted, that the Assembly needed more powers to meet the needs of the people in Wales.¹⁰³

Following the report, the UK Labour Government published a White Paper 'Better Governance for Wales'¹⁰⁴ in 2005. In his introduction the Secretary for State for Wales, Peter Hain,¹⁰⁵ noted:

With equal numbers of male and female members, and pioneering commitments to open government, sustainable development and equal opportunities, the Assembly has been a progressive institution, which has rapidly established itself as part of our political landscape and attracted interest from around the world. The Assembly has given Wales a stronger, more democratically accountable voice in Britain and in Europe. And the partnership with the UK Government has worked well.¹⁰⁶

This consultation was followed by the Government of Wales Act 2006¹⁰⁷ which made a number of significant changes to the devolution settlement including powers for the Assembly to seek permission to create legislation on devolved issues¹⁰⁸ separating the executive and legislature

⁹⁸ Law Wales: Branches of Government in Wales < <https://law.gov.wales/constitution-government/intro-to-constitution/three-branches-government/?lang=en#/constitution-government/intro-to-constitution/three-branches-government/?tab=overview&lang=en> > accessed 9 October 2020.

⁹⁹ An appointments process was used to ensure transparency. Five Commissioners were appointed following open competition and interview.

¹⁰⁰ Evidence was widely gathered with 115 evidence sessions, 3 seminars, 2 consultation papers, over 300 written submissions and 9 public meetings with the final one held at the National Eisteddfod in Meifod.

¹⁰¹ Report of the Richards Commission 'Commission on the Powers and Electoral Arrangements of the National Assembly for Wales' 2004.

¹⁰² Which were unanimous although on Commissioner, Ted Rolands a former Labour MP for Merthyr, wanted to see a referendum before further powers were given.

¹⁰³ See eg BBC news report 31 March 2004 <<http://news.bbc.co.uk/1/hi/wales/3585575.stm>> accessed 9 October 2020.

¹⁰⁴ Ysgrifennydd Gwladol am Wales, Trefyn Lywodraethu well I gymru (Cmd 6582, 2005). Secretary of State for Wales, Better Governance for Wales (Cmd 6582, 2005).

¹⁰⁵ Labour MP for Neath.

¹⁰⁶ Ibid 104, 2. The introduction went on to say that devolution had strengthened the United Kingdom and reduced Nationalism. A claim that was to become outdated less than a decade later.

¹⁰⁷ The act has been significantly amended since 2006.

¹⁰⁸ These took the form of Assembly Measures and enabled enhanced legislative powers to be gained.

by establishing the Welsh Government as an executive body and making provision for further referendums on extending the powers of the Welsh Assembly¹⁰⁹.

However, Devolution Guidance Note 9¹¹⁰ noted:

From May 2007, the legislative competence of the National Assembly for Wales will be much more limited in scope than the executive functions of the Welsh Ministers. This is a direct consequence of the unique nature of the Welsh devolution settlement.¹¹¹

Although a response to the Richards Commission, the 2006 Act did not go far enough for many. Growing public awareness and a sense of opportunity created by the support shown within Wales for greater powers for the Welsh Assembly and by the UK Government led to calls for further change.

In 2007 the 'One Wales'¹¹² coalition was created by Plaid Cymru and Labour. They committed to the principles of social justice, sustainability and inclusivity whilst noting the work that had been undertaken to reach a joint agreement they set out a vision for the future of Wales.¹¹³ Opportunities offered by the 2006 Act were to be built on. The commitment included:

There will be a joint commitment to use the Government of Wales Act 2006 provisions to the full under Part III and to proceed to a successful outcome of a referendum for full law making powers under Part IV as soon as practicable [...]

Both parties will then take account of the success of the bedding down of the use of the new legislative powers already available and, by monitoring the state of public opinion, will need to assess the levels of support for full law-making powers necessary to trigger the referendum.¹¹⁴

In 2010¹¹⁵ Assembly Members voted to support a referendum on further law-making powers. The UK Government passed the necessary legislation¹¹⁶ and a non-binding referendum¹¹⁷ was held in March 2011. The question put to voters concerned the powers of the Welsh Assembly and whether it should have full law-making powers in the twenty areas under its jurisdiction. The majority voted for full law-making powers. This resulted in amendments to existing legislation giving powers to the Assembly law in relation to all 20 devolved areas.¹¹⁸

¹⁰⁹ The National Assembly now had the power to make laws for Wales in defined areas. However, the process was complex and usually achieved through Legislative Competence Orders approved by the National Assembly and by both Houses of the UK Parliament. It was also done by framework powers conferred directly on the National Assembly through sections that were included in Acts of the UK Parliament.

¹¹⁰ Devolution Guidance Notes are issued for Whitehall Departments by the UK Government. Guidance Note 9 outlined arrangements for managing new legislation affecting the responsibilities of either the National Assembly for Wales or the Welsh Assembly Government. See < <https://www.gov.uk/government/publications/devolution-guidance-notes> > accessed 9 October 2020.

¹¹¹ Devolution Guidance Note 9: Post-devolution primary legislation affecting Wales Para 8.

¹¹² 'One Wales: A progressive agenda for the government of Wales. An agreement between the Labour and Plaid Cymru Groups in the National Assembly' published 27th June 2007.

¹¹³ The vision included both visionary and practical policies such as the all Wales coast path.

¹¹⁴ Ibid 112, 6.

¹¹⁵ An All Wales Convention had been established by the Welsh Assembly Government. The purpose was to gauge public understanding of the devolution settlement and assessing whether a referendum could be successful. It concluded that the settlement was not well understood but "that a 'yes' vote in a referendum was a possibility.

¹¹⁶ This was done by Statutory Instrument and not Act of the UK Parliament see The National Assembly for Wales Referendum (Assembly Act Provisions) (Referendum Question, Date of Referendum Etc.) Order 2010.

¹¹⁷ Turnout was 35.6 %, (the second lowest in a major referendum; turnout for the London Mayoral election had been lower). 50.3% voted yes and 49.7% no. The campaign had not sparked popular interest and the complex nature of the devolution settlement posed a challenge in explaining what was being proposed.

¹¹⁸ Schedule 7 of the Government of Wales Act 2006 as amended.

The power came into effect almost immediately in May 2011. Wales had now moved to a conferred powers model of devolution.¹¹⁹

In 2013 a memorandum of understanding¹²⁰ (MoU) was published. This set out principles outlining how the UK Government and governments of the devolved administrations¹²¹ would work together. It also created a Joint Ministerial Committee, attended by representatives of the three devolved administrations and the UK Government. The MoU noted:

However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.¹²²

This will be returned to later and is included here as events have been considered in a chronological order.

Following the 2011 referendum and transfer of greater powers¹²³ the UK Government established the Silk Commission to consider the future of the devolution settlement in Wales. The remit of the Commission was:

Part I: Financial Accountability: To review the case for the devolution of fiscal powers to the National Assembly for Wales and to recommend a package of powers that would improve the financial accountability of the Assembly, which are consistent with the United Kingdom's fiscal objectives and are likely to have a wide degree of support.

Part II: Powers of the National Assembly for Wales: To review the powers of the National Assembly for Wales in the light of experience and to recommend modifications to the present constitutional arrangements that would enable the United Kingdom Parliament and the National Assembly for Wales to better serve the people of Wales.¹²⁴

In 2012, the Silk Commission published Part I¹²⁵ of its report, making recommendations on the financial powers of the Assembly. Part II making recommendations on the Assembly's future legislative powers and arrangements was published in 2014.¹²⁶ In Part II it was concluded:

We believe that the people of Wales will be best served by a clear, well-founded devolution settlement; and by political institutions that operate effectively and efficiently and work together in the interests of the people they serve. Devolution of power to Wales should benefit the whole of Wales and the United Kingdom.

¹¹⁹ As noted in Silk II 'Empowerment and Responsibility – Legislative Powers to Strengthen Wales' at 2.2.5 'the fourteen years of devolution in Wales have seen broadly three stages of development'.

¹²⁰ Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Presented to Parliament by Command of Her Majesty and presented to the Scottish Parliament and the Northern Ireland Assembly and laid before the National Assembly for Wales. October 2013.

¹²¹ The Scottish Government, Welsh Government and Northern Ireland Executive.

¹²² Ibid para 14.

¹²³ Law making powers in 20 specified areas without involvement from the UK Parliament or Whitehall.

¹²⁴ Comisiwn ar Ddatganoli yng Nghymru, Commission on Devolution in Wales 'Empowerment and Responsibility: Legislative Powers to Strengthen Wales' 2014. See Box 1.1 in 1.1.9.

¹²⁵ Comisiwn ar Ddatganoli yng Nghymru, Commission on Devolution in Wales 'Empowerment and Responsibility: Financial Powers to Strengthen Wales' 2012.

¹²⁶ Comisiwn ar Ddatganoli yng Nghymru, Commission on Devolution in Wales 'Empowerment and Responsibility: Legislative Powers to Strengthen Wales' 2014.

Any proposed changes to the devolution settlement should be tested according to the principles of accountability, clarity, coherence, collaboration, efficiency, equity, stability and subsidiarity.¹²⁷

The Wales Act 2014 resulted from Part I of the Report. This created several new financial powers enabling the Assembly to legislate¹²⁸ on devolved taxes¹²⁹ and made technical changes¹³⁰ to the Government of Wales Act 2006. Part II recommended that Wales move to a reserved powers¹³¹ model for devolution. In response to this recommendation the UK Government undertook a consultation and published 'Powers for a Purpose' in 2015.¹³² In the introduction the Secretary of State for Wales, Stephen Crabb,¹³³ noted:

I want to establish a clear devolution settlement for Wales which stands the test of time. I firmly believe that there should always be a clear purpose for devolving new powers to the Assembly, and that the Assembly and the Welsh Government should use any new tools and levers to put Wales in a stronger position to develop as a nation. [...]. Discussions will continue as we move to implement this agreement, particularly with regards to developing the reserved powers model. I believe we now have a strong blueprint for a new Wales Bill in the next Parliament.¹³⁴

A blueprint for further devolution and a move to a reserved powers model was outlined. The 2017 Wales Act followed. The National Assembly and the Welsh Government became a permanent part of the UK's constitutional arrangements.¹³⁵ The Act amended the Government of Wales Act 2006.¹³⁶ Powers to relation to Assembly elections¹³⁷ and other matters such as speed limits and marine licencing¹³⁸ were also outlined.

In addition, the 2017 Wales Act gave powers to the Assembly to change its name. By this time, it had commonly become known as the Senedd. To reflect the move to a reserved powers model Assembly members agreed unanimously that the name of the Assembly should reflect its constitutional status as a national parliament. There was however disagreement over possible names.¹³⁹

In February 2019 the Elections (Wales) Bill was introduced. The Bill proposed to lower the voting age for Assembly elections to 16 and change the name of the Assembly. The Senedd and Elections (Wales) Act 2019 came into force in January 2020 and on 6 May 2020, the Assembly formally changed its name to Senedd Cymru or Welsh Parliament.¹⁴⁰

¹²⁷ Ibid 126. Paras 3.4.1 and 3.4.2.

¹²⁸ The need for a referendum on Welsh rates income tax was removed by the Wales Act 2017.

¹²⁹ See subsequently The Tax Collection and Management (Wales) Act 2016 and The Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017.

¹³⁰ These changes included lengthening the term of an Assembly to 5 years and preventing an individual from being an MP and AM simultaneously.

¹³¹ Anything not reserved would be devolved, and the National Assembly for Wales would be able to pass laws in those areas. This would put the Assembly on the same footing as the Scottish Parliament.

¹³² Secretary of State for Wales 'Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales' (Cm9020, 2015).

¹³³ MP Preseli Pembrokeshire, Conservative Party.

¹³⁴ Ibid 132 pp 6-7.

¹³⁵ s A1 Government of Wales Act 2006. They could not be abolished without the agreement of the people of Wales. In a similar fashion to the way in which the Scottish Parliament and Scottish Government have been placed as a fixture of the UK's constitution.

¹³⁶ In particular s 108A, Schedule 7A and Schedule 7B.

¹³⁷ In December 2017 the Expert Panel on Assembly Electoral Reform recommended lowering the voting age for Assembly elections to 16. 16-year olds vote in the 2021 May elections for the first time.

¹³⁸ However, unlike Scotland Wales does not have its own separate legal jurisdiction.

¹³⁹ See BBC news 9 November 2019 <<https://www.bbc.co.uk/news/uk-wales-politics-49973487>> accessed 9 October 2020.

¹⁴⁰ More commonly referred to as the Senedd.

Welsh devolution has been a complex journey and the complexity continues. Both England and Wales share one legal jurisdiction¹⁴¹ and both the Welsh and UK Parliaments can now create laws within that jurisdiction. In 2017 the Welsh Government, firmly committed to an open and transparent system of laws and law-making set up 'The Commission on Justice in Wales'. The report¹⁴² that followed set a long-term vision for the future of justice in Wales. It noted:

We address our report to the Welsh Government. It has been our privilege to be given the opportunity by the Welsh Government to undertake this task. We hope that we have discharged the heavy responsibility placed on us. The evidence we obtained about the current justice system in Wales is presented in an unvarnished manner. Our recommendations, radical though some need to be, will give the people of Wales a better means of achieving a system which provides access to justice, can be trusted to deliver justice and puts justice again at the heart of their nation and its prosperity.

It remains to be seen whether calls for the devolution of justice are answered. Scotland had retained its separate legal jurisdiction, so the question had not arisen as part of the devolution settlement there.

5. Legislative process and legislative competence: transparent or opaque?

Having considered the process of devolution this section considers specific aspects in relation to the Welsh and Scottish Parliaments.

The Scottish and Senedd Cymru¹⁴³ both follow set processes in law making. These are set out in the legislation creating¹⁴⁴ their legislative powers. Although more streamlined than those used in the UK Parliament¹⁴⁵ they still require several stages to be followed and there is emphasis on legislative scrutiny at committee stages. If these processes are not followed, then any legislation produced as a result is void.

Both the Scottish Parliament and Senedd Cymru can also only act within their legislative competence. This is generally considered against a number of criteria: that the UK Parliament can only legislate for or in relation to Scotland or Wales in relation to reserved matters; the UK Parliament cannot modify certain enactments (these include the Human Rights Act 1998, certain provisions of the Acts of Union 1705-6 and the European Communities Act 1972¹⁴⁶); any legislation must be compatible with the European Convention on Human Rights (ECHR) and with European Union¹⁴⁷ law and the Scottish Parliament cannot remove the Lord Advocate from their position as head of the system for criminal prosecution. The concept of legislative competence is important because in both the Scottish Parliament and Senedd Cymru the legislative competence of any Bill has to be assessed before it is introduced, and an opportunity provided for it to be challenged after a Bill is passed but before it becomes law.

¹⁴¹ Wales and England have shared one legal jurisdiction and court system since the abolition of the Court of Great Session in Wales in 1830. Though the abbreviation English Legal System (or ELS) has been in widespread use and is misleading.

¹⁴² The Commission for Justice in Wales Report 'Justice in Wales for the people of Wales' 2019.

¹⁴³ The Scotland Act 1998 and The Government of Wales Act 1998. Section 36(1) of the Scotland Act 1998 required there to be at least three distinct stages to which Bills are subject, including a stage when MSPs can debate and vote on the general principles of a Bill, a stage when they can consider and vote on its details and a final stage when the Bill can be passed or rejected.

¹⁴⁴ Some authors use the word creating, others use devolving.

¹⁴⁵ For the UK Parliament see < <https://www.parliament.uk/about/how/laws/passage-bill/> > For the Scottish Parliament see < <https://www.parliament.scot/visitandlearn/100530.aspx> >. For the Welsh Parliament see <https://senedd.wales/en/bus-home/bus-legislation/Pages/bus-legislation.aspx> >

¹⁴⁶ Reference is now to retained EU law.

¹⁴⁷ Ibid 146.

Legislative competence¹⁴⁸ has become a way of determining whether an Act has been produced within the powers of the Scottish Parliament or Senedd Cymru. This represents a change in the legal culture of both Scotland and Wales. Practising and academic lawyers had, until this point, been taught that an Act of Parliament *was* law. With the introduction of the Scottish Parliament and Senedd Cymru they must now question whether an Act of Parliament *is* law. If an Act of the Scottish Parliament or Senedd Cymru has been passed in an area where there is no legislative competence, that Act can be challenged.¹⁴⁹ Where such issues arise, they will be determined by a court. The final court for the determination of these issues is the Supreme Court of the United Kingdom.

However, there are many twists and turns in the narrative of devolution. Legislative competence and compliance with EU law have been brought into sharp focus in recent years by the debates and negotiations around UK Government plans for leaving the EU. Both Welsh and Scottish Governments have questioned the plans and sought to have their voices heard.¹⁵⁰ The UK Government has failed to liaise on several occasions leading to challenges and opposition. It remains unclear how the exclusive competencies of the Scottish Parliament and Senedd Cymru will be returned from the EU. Plans for these to go to UK Government Ministers and then be delegated were, at one time, felt appropriate by the UK Government. Politics once again seems to have intervened in what have become constitutional settlements.

There is on-going debate and tension between a return to a centralised model and one of subsidiarity. In 2018 the House of Commons Public Administration and Constitutional Affairs Committee published a report on 'Devolution and Exiting the EU: reconciling differences and building strong relationships'.¹⁵¹ The committee noted that:

Devolution is now an established and significant feature of the UK constitutional architecture and should be treated with respect to maintain the integrity of the United Kingdom. The Government needs to bring clarity to the situation by setting out, in response to this Report, its Devolution Policy for the Union¹⁵²...

At the time of writing there has been no UK Government response.

In a twist that relates to the concept of 'Parliamentary Sovereignty'¹⁵³ the legislation which sets out the powers of the Scottish Parliament and Senedd Cymru¹⁵⁴ states 'But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the [...] Parliament'. Legislative consent motions have been the result.¹⁵⁵ Defined by the UK Parliament as 'the means by which a devolved legislature indicates that it is content for the UK Parliament to pass a law on a devolved matter',¹⁵⁶ and

¹⁴⁸ Initial challenges were often brought on grounds under the Human Rights Act, however, since 2008 challenges based on legislative competence alone have grown.

¹⁴⁹ A declaration of incompatibility is issued in relation to the UK Parliament and the legislation remains law unless the UK Parliament repeals it.

¹⁵⁰ 'First Ministers call on the Prime Minister to work with, not against, the devolved nations' Press Release September 2017. Also eg statements made by the First Ministers including 19 December 2018 at <<https://www.gov.scot/news/brexit-talks-3/>> accessed 9 October 2020 and Y Cyfarfod Llawn (Plenary Session) 5 September 2019 at 245.

¹⁵¹ House of Commons Public Administration and Constitutional Affairs Committee 'Devolution and Exiting the EU: reconciling differences and building strong relationships' Eighth Report of Session 2017-19, HC 1485.

¹⁵² Ibid 150. Summary section, 3.

¹⁵³ A much-used phrase in recent years by politicians in relation to the UK's departure from the EU. It is a multifaceted concept, but the view espoused often draws upon is the work of A.V. Dicey an English Jurist writing in the early twentieth century and his 'Introduction to the Study of the Law of the Constitution' n 49 above.

¹⁵⁴ The Scotland Act 2016 s 2 which amended the Scotland Act 1998 and the Wales Act 2017 s 2 which amended the Government of Wales Act 2006.

¹⁵⁵ Legislative consent memoranda are laid before the Scottish Parliament or Senedd Cymru.

¹⁵⁶ UK Parliament Glossary < <https://www.parliament.uk/site-information/glossary/legislative-consent/>> accessed 9 October 2020.

sometimes referred to as Sewel motions,¹⁵⁷ they provide an example of a convention which was put on a statutory basis.¹⁵⁸ They cover three areas: legislation which changes the law in a devolved area of competence, alters the legislative competence of a devolved legislature or alters the executive competence of devolved minister. In theory the powers of the Welsh or Scottish parliaments or Welsh or Scottish ministers cannot be reduced. However, to be successful, the convention relies upon trust and cooperation between governments and political parties, and events in the recent decade including increasing polarisation between political parties and changes in voting patterns have helped highlight its limitations. Plans for the UK and its four Nations post EU membership are unclear¹⁵⁹ and the UK Supreme Court views legislative consent motions as a convention which are not subject to judicial review.¹⁶⁰

However, in the previous decade the UK Parliament enshrined both the Scottish Parliament and Senedd Cymru as part of the UK's constitution.¹⁶¹ This was not done via referendum but formed part of the evolving piecemeal approach to the devolution settlements. This can only be overturned by vote of those living in each Nation. A contradictory approach has emerged. There are new constitutional features which resulted from referendums in Scotland and Wales, there has been no referendum on the subject in England, the underlying constitutional principles draw on the work of English constitutional lawyers and the concept of Parliamentary Sovereignty is used by politicians to overcome all.

In a further twist in 2015 the House of Commons approved a change in its Standing Orders.¹⁶² This created a process known as 'EVEL' or 'English Votes for English Laws'. The Speaker of the House of Commons determines whether a bill can go through this process. The changes introduced additional stages in the parliamentary process between the Report Stage and Third Reading of a Bill. If a Bill goes through this process only MPs representing English constituencies receive a vote. However, the acronym is misleading as the process can also be applied to Bills which cover both England and Wales.¹⁶³

6. Conclusion

Common themes emerge through the discussions surrounding devolution; a devolving of powers in the interests of strengthening the Union, political divide, debates around democracy and constitutional change, recognising diversity, consultations, reports, transparency and referendums. Devolution has not been a straightforward narrative or journey, whether in Scotland or Wales and debates over the UK's exit from the EU add additional twists and turns.

Neither the Scottish Government or Welsh Government are content with the current position, with the UK Government's policy on EU negotiations or the lack of consultation on matters within their exclusive jurisdiction under the 'reserved powers' model they now share. Calls for independence are growing in both Nations.¹⁶⁴ The Welsh Government recently published a

¹⁵⁷ Lord Sewel, then Parliamentary Under-Secretary of State for Scotland announced the policy in the House of Lords during the passage of the Scotland Act 1998.

¹⁵⁸ Ibid 153.

¹⁵⁹ On 8 January 2020 Scottish Parliament voted to withhold consent for the EU (Withdrawal Agreement) Bill.

¹⁶⁰ R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) [2017] UKSC 5

¹⁶¹ S 63A Scotland Act 2016. Government of Wales Act 2006 s A1.

¹⁶² Implementing Conservative Government Policy but also seen by some commentators as highlighting a disjunct between the nature and purpose of the Union. See 'Governing England English Identity and Institutions in a Changing United Kingdom' published in 2018.

¹⁶³ In which case MPs representing English and Welsh constituencies receive a vote. For more detail see <https://www.parliament.uk/about/how/laws/bills/public/english-votes-for-english-laws/> accessed 9 October 2020.

¹⁶⁴ Referendums (Scotland) Act 2020. Scottish Government 'Protecting Scotland, Renewing Scotland: The Government's Programme for Scotland 2020-2021' 2020. 'Poll: Support for independence hits historic high of 58%' 14 October 2020 <<https://news.stv.tv/politics/poll-support-for-independence-hits-historic-high-of-58?top>> accessed 3 December 2020. For Wales see YouGov poll January 2020 and coverage eg <<https://nation.cymru/news/support-for-welsh-independence-up-5-in-new-yougov-poll/>> accessed 9 October 2020.

report on the reforms that they see as necessary to put the Union on a sustainable footing for the future. That concludes:

Future constitutional developments in the United Kingdom should be considered on a holistic basis and on the basis of constitutional principle, rather than by way of ad hoc reforms to particular constitutional settlements. This should be undertaken by a constitutional convention. The case for a written constitution should form part of the convention's deliberations.¹⁶⁵

However, whilst devolution remains mired in political debates and traditional constitutional thinking the way forward remains unclear. Politicians may talk of a Union that is stronger together, but the successes of the Scottish Parliament and Welsh Parliament raise questions about the future constitutional shape of the UK. However, discussions around the changing nature of parliamentary sovereignty tend to remain in academic publications and the court room. In 'Reforming our Union: Shared Governance in the UK'¹⁶⁶ the First Minister of Wales commented on the vacuum in the UK's Government thinking. A House of Commons paper noted:

there are different views on where sovereignty, and therefore where ultimate authority, lies. The UK Government's position is that the sovereignty of the Westminster Parliament is a constitutional fact. Yet the range and extent of areas where Parliament can legitimately exercise its power have been altered by the devolution settlements, which has introduced political considerations that has arguably qualified sovereignty within the UK. It is the exact nature of that qualification which is contested between the devolved administrations and the UK Government.

[...]

Any discussion of devolution would be incomplete without serious consideration of the position of England within the constitutional architecture of the UK. We received evidence pointing to a significant asymmetry between the representation of the people of England within the Union when compared with the people of Scotland, Wales and Northern Ireland. We recommend that the Government sets out, as part of its statement of 'Devolution Policy for the Union', how the different parts of England are to be fairly and effectively represented.¹⁶⁷

The United Kingdom exists because of a series of historical events and the Union has been a pragmatic one. This century will see some of its greatest challenges, challenges that come from within. It is unclear at what point calls for a UK-wide conversation around the UK's constitution would be heeded and whether the opportunities created by devolution will be used to inform that conversation. Lord Beaumont of Whitley's thoughts expressed in the parliamentary debate on the Royal Commission on the Constitution remain as relevant today as they were in 1973.

7. Finally

We began this Chapter noting the 50th anniversary of the OU. The university accepted its first law students in February 1998 and planning for the law degree mirrored the debates and referendums on devolution. Law School academics work across all four UK nations and have

¹⁶⁵ Llywodraeth Cymru: Welsh Government 'Reforming our Union: Shared Governance in the UK' 2019 Chapter 9 Annex 1 para 20.

¹⁶⁶ Ibid 163.

¹⁶⁷ Ibid 150 see summary on p 3.

watched and debated the devolution process over the past twenty years. We hope this chapter has helped provide an insight into devolution in two of the UK's nations.

Chapter 3

50 years Arguing with Neighbours: The UK's Complex Relationship with the European Union

Anne Wesemann

Abstract

1969 determined the UK's fate as an European Union (EU) Member State. Finally, with the 'cock' who crowed 'NON' twice making way, the route was clear for the UK to join the then European Community. The UK became a Member State in 1973 but it was neither smooth sailing to get to that point nor has it been since. The early years of membership were marked by doubts over the nature of the developing communities and the role the UK would be playing in that development were it to leave or remain. This led to a first UK referendum in 1975 on membership which confirmed the UK government's decision to join. Forty-one years later, a second referendum decided the UK should leave and paved the way to a slow exit. In between lay numerous economic crisis and domestic as well as international political challenges.

As the last full year of UK EU Membership, 2019 marks an end to a struggling 'ever closer' relationship. This chapter will shed some light on the 50 years of struggle between the what is now the European Union and the UK. It will draw on historical, political, economic and legal perspectives in examining the relationship. It will present an overview of the humble beginnings of the EU and the UK's role in that, and the relationship's stormy youth, when the world faced a global economic crisis. This chapter will examine whether the UK was being led or was leading in key matters of EU policy and law; in doing so it will consider arguments around sovereignty, or rather what there was to gain back after 2019. Lastly, it will in its conclusions draw from the evidence of the past 50 years to imagine how the challenges of the past can be overcome to enable a functioning relationship in the 50 years ahead.

1. Introduction

"It is to re-create the European Family, or as much of it as we can, and provide it with a structure under which it can dwell in peace, in safety and in freedom. We must build a kind of United States of Europe.

In this way only will hundreds of millions of toilers be able to regain the simple joys and hopes which make life worth living."

Winston Churchill¹

Every analysis of political relationships needs to be set in its historic context to evaluate the impact of the relationship on the countries involved, and their legal systems, if it is to be of any value. Context matters and the context of the early foundations of the UK's relationship with

¹ Winston Churchill, 'Speech on a Council of Europe' (Zurich, 19 September 1946)
<<http://aei.pitt.edu/id/eprint/14362>> accessed 03 October 2020.

the European Union (EU) is war in Europe.² Not just any war, a world war, the second in the same century, causing death, suffering, poverty and economic crisis amongst other evils.

Churchill's plea, made in Zurich, is to be seen in that context. The 'United States of Europe' he envisaged would counteract the perceived threat from the Eastern communist Union, and provide stability to the continent. His vision aimed to prevent central European nations falling into what seemed to be established routines of warmongery for a third time in the same century, or indeed ever again.³ Unification of Europe was meant to "make it plain that any war [...] becomes not merely unthinkable, but materially impossible."⁴

While Churchill is on the list of European pioneers, his relationship with continental Europe, and his understanding of the UK's role within Europe as a whole, was not that of a wholehearted Europhile.⁵ Just 16 years before his Zurich address, and therefore before the war, Churchill saw the UK "with Europe, but not of it".⁶ The Second World War had clearly shifted Churchill's thinking, and with that he becomes a suitable symbol for the complexities that were to define the relationship between the UK and the EU.

The UK consciously decided not to become part of the founding communities, seeing itself as one of the Allies and therefore untouched by the rationale of any form of unification within Europe. When it later on was keen to join the 'ever closer Union', it was blocked from doing so, because of the communities unanimity rules - directly by de Gaulle's adamant "Non!".⁷ While some argue the UK 'missing the boat' of membership at the founding stage caused unsurmountable friction between the EU to be and the UK, others are convinced that the two parties are too dissimilar, thus a relationship of any form was bound to fail eventually.⁸

This paper will explore the turbulent journey of the UK and EU as neighbours, partners and divorcees. In doing so, it will discuss different approaches to the analysis of this relationship in historic, political, economic and legal discourses. Some of these will complement each other, others will be in direct conflict. The chapter will demonstrate, how domestic challenges in the UK always impacted the way the country viewed its place in a European union, but also how its self-centredness led to self-fulfilling crisis. This paper will offer a view with regards to the UK's leadership role within the EU and show how long lasting the political impact of UK membership will be on the bigger union's structure and form. In its conclusions, the paper will consider what a fully functioning future relationship between the UK and the EU would need to acknowledge and overcome, discussing whether there may be a role the UK cannot escape in Europe and the world, whether it will like it or not.

² The complex relationship between Great Britain, Ireland & Northern Ireland cannot be given justice within the limitations of this paper. As the EU membership included Northern Ireland and other parts of the UK, reference throughout this chapter will be made to the UK, although citations will use the country reference as made by the author.

³ Winston Churchill; 'Speech on a Council of Europe'.

⁴ Robert Schuman, 'The Schuman Declaration' (9 May 1950) <https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en> accessed 21 September 2020.

⁵ A list of European pioneers can be found on one of the official EU websites <https://europa.eu/european-union/about-eu/history/eu-pioneers_en> accessed 03 October 2020; Discussing some of the pioneers and their motives critically is Alan S. Wilward, *The European Rescue of the Nation-State* (Routledge 1992) 333 – 363.

⁶ Will Morrissey, *Churchill and de Gaulle The Geopolitics of Liberty* (Rowman & Littlefield 2015) 96.

⁷ Wilward, *The European Rescue of the Nation-State* 338.

⁸ Among others: Anthony Nutting, *Europe Will Not Wait: A Warning and a Way Out* (Hollis & Carter 1960) 103; Elisabeth Barker, *Britain in a Divided Europe, 1945 – 1970* (Weidenfeld & Nicolson 1971); James Allison, 'The European Rescue of Britain' in Fernando Guiaro, Frances M.B. Lynch and Sigfrido M. Ramirez Perez, *Alan S. Milward and a Century of European Change*, (Routledge 2012) 511; Ann Lyon, *Constitutional History of the UK* (Cavendish Publishing Limited 2003) 415 f; Mark Baimbridge, Philip B. Whyman & Brian Burkitt, *Moored to the Continent? Future Options for Britain and the EU* (Andrews UK Limited 2012) 23.

2. Humble Beginnings

“The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.”

*Robert Schumann*⁹

Schumann very clearly outlined the focus of the community that was about to be built in the centre of Europe. The creation of the European Coal and Steel Community united the economic interests of France, West Germany, Italy, the Netherlands, Belgium and Luxembourg; and in doing so set the tone for other communities. There was a real pressure to achieve nothing less than “the realization of the first concrete foundation of a European federation indispensable to the preservation of peace.”¹⁰

The UK sat comfortably outside this project, viewing itself as a world power that had guided and supported peace in Europe. It showed no appetite to join any form of formal community;¹¹ to be fair, there was “a whole raft of Europes” to choose from at this point.¹² Unique to its European neighbours, the UK saw its interests as firmly aligned with its Commonwealth, in which Britain continued to view itself as the central power, benefiting substantially economically and politically from these well-established relations.¹³ As the six European nations under the Treaty of Rome continued to prosper as the European Economic Community (EEC), outpacing the UK’s economic growth of the late 1950s, the UK slowly started to reconsider its position, eventually driving the founding of the European Free Trade Association (EFTA) as an attempt to even up disparities in growth with its neighbours.¹⁴ This enabled free movement of goods between the UK, the EFTA members (Denmark, Norway, Sweden, Austria, Switzerland and Portugal) as well as the EEC, but this did not stimulate the UK domestic economy sufficiently to emulate the growth created within the EEC.

The UK started to seriously consider joining the six, leading some to argue that this decision was based solely on economic considerations.¹⁵ Crowson suggests the picture was somewhat more complex, however, and involved political considerations as well. One particular influence was the ‘special’, yet ever changing, relationship between the USA and the UK, and another the UK’s persistent fear of a diminishing “diplomatic clout” in Europe.¹⁶ Saunders quotes the Chancellor of the Exchequer, Derick Heathcoat-Amory noting in 1960 that “entry was ‘a political act with economic consequences’, rather than the reverse.”¹⁷ Some argue that the Suez crisis was a particular catalyst for the UK’s change of mind regarding membership, as

⁹ Schumann, ‘The Schuman Declaration’.

¹⁰ *ibid.*

¹¹ Lyon, *Constitutional History of the UK* 415.

¹² N.J. Crowson, *Britain and Europe – A Political History Since 1918* (Routledge 2011) 1.

¹³ Lyon, *Constitutional History of the UK* 415; Alan S. Milward, *The Rise and Fall of a National Strategy 1945 – 1963, The UK and The European Community, Vol. I* (Whitehall History Publishing 2002) 188; Frances M.B. Lynch and Fernando Guiaro, ‘A Lifetime’s Search for a Theory of Historical Change, Introduction to the Work of Alan S. Milward’ in Guiaro, Lynch and Perez, *Alan S. Milward and a Century of European Change* 118 ff; Crowson, *Britain and Europe* 79.

¹⁴ Lyon, *Constitutional History of the UK* 415.

¹⁵ Anne Deighton, ‘The Labour Party, Public Opinion and the ‘Second Try’ in 1967’ in Oliver J. Daddow, *Harold Wilson and European Integration, Britain’s Second Application to join the EEC* (Routledge 2016) 40; Crowson, *Britain and Europe* 80.

¹⁶ Crowson, *ibid* 13.

¹⁷ Robert Saunders, *Yes to Europe! The 1975 Referendum and Seventies Britain*, (Cambridge University Press 2018) 46.

the crisis led to insecurity over the role of Britain in the world.¹⁸ Historians continue to argue about, whether it was the threat of an overpowering Soviet Union, the disappointment following Suez, or the thriving economies of the six, that caused the UK to look differently at its potential relationship with them. Crowson, however, summarises the UK's motivation neatly, in reference to Milward, providing an oversimplification: The UK had to prevent the fading of its global influence by all means necessary.¹⁹

It took the UK three attempts to join the EEC. It is no coincidence that the UK's application succeeded the same year that Charles de Gaulle, French President till 1969, resigned.²⁰ Until then, the previous two applications fell victim to the Communities unanimity rule as France vetoed UK membership.²¹ The British Prime Minister, Harold Macmillan, saw the French President as "the cock on a small dunghill" concerned about the power shift likely to occur with the UK's accession.²² The reference to the dunghill is to the comments of a French Agriculture Minister who summarised the rationale for the French opposition as: "Mais il y aura deux coqs. Alors ce n'est pas aussi agréable [But where you have two cockerels that would not be at all agreeable!]"²³ Anecdotes like this serve as evidence that it was not just the views of the Macmillan government at play, but an inheritance of personal preference and the history of past conflicts that influenced decision making in the infantile united Europe.²⁴

The UK's accession to the EU was finally completed in 1973, but there was some reluctance expressed by politicians and some members of the UK public. Two years later, in 1975, it was felt advisable to hold the UK's first referendum on EU membership. There is much scholarship on the domestic politics at play at the time, seemingly viewing the Labour government and Harold Wilson as significant contributors to the EEC accession success.²⁵ However, the two main political parties were very divided on the 'issue of Europe' throughout the 1960s and 70s. They have remained so ever since. The announcement of the 2016 referendum and its aftermath if anything deepened the division in public opinion within the UK, but this difference of public opinion was not a reflection of political party allegiances.²⁶

So far, the focus of the chapter has been on how politicians dealt with the question of accession and closer ties with the UK's mainland neighbours. The UK public was given a very selective and specific version of what the UK's new partnership would mean for them from the late 50's onwards. It was promised that membership "would bring higher standards of living, though it was admitted that food prices would rise because of the ending of cheap imports from the Commonwealth under preferential tariffs, and Britain would be required to make large

¹⁸ Among others: Ralph Dietl, 'Suez 1956: A European Intervention?' (2008) 43 *Journal of Contemporary History* 259; Crowson, *Britain and Europe* 73; Tore T. Petersen, 'Suez 1956, European Colonial Interests and US Cold War Prerogatives' in Daniel Möckli and Victor Mauer (eds), *European – American Relations and the Middle East, From Suez to Iraq* (Routledge 2011) 11; Peter J. Beck "The Less Said about Suez the Better": British Governments and the Politics of Suez's History, 1956 – 67' (2009) CXXIV (508) *The English Historical Review* 605; G. C. Peden 'Suez and Britain's Decline as a World Power' (2012) 55(4) *The Historical Journal* 1073; Pnina Lahav 'The Suez Crisis of 1956 and its Aftermath: A Comparative Study of Constitutions, Use of Force, Diplomacy and International Relations' (2015) 95 *Boston University Law Review* 1297.

¹⁹ Crowson, *Britain and Europe* 73.

²⁰ Lyon, *Constitutional History of the UK* 417.

²¹ Stephen Wall, *The Official History of Britain and the European Community: From Rejection to Referendum, 1963 – 1975* (Routledge 2013) 7.

²² *ibid*, in reference to Charles de Gaulle's opposition to UK membership and an anecdote of an exchange involving Prime Minister Harold Macmillan.

²³ *ibid*; On the complexity of the UK-French relationship with a focus on Churchill and de Gaulle's also see: Morrissey, *Churchill and de Gaulle The Geopolitics of Liberty* 327 ff.

²⁴ Morrissey, *Churchill and de Gaulle The Geopolitics of Liberty* analyses the complex history of Churchill and de Gaulle's through the lenses of their personal experiences and background.

²⁵ Lyon, *Constitutional History of the UK* 417.

²⁶ Crowson, *Britain and Europe* 91; Anne Applebaum, 'A Transformed Political Landscape' (2017) 28 *Journal of Democracy* 53, 54 f; Sara B. Hobolt, 'The Brexit Vote: a Divided Nation, a Divided Continent' (2016) 23 *Journal of European Public Policy* 1259, 1260; Saunders, *Yes to Europe!* 57 f, 61 f; Hugo Young, *This Blessed Plot, Britain and Europe from Churchill to Blair*, (Macmillan 1999) 270 f.

contributions to the central EEC budget.”²⁷ There was no discussion of how EU law had already evolved, through a series of decisions of the European Court of Justice mainly, into a directly applicable source of law within the Member States, equal, if not supreme to the domestic law. The UK public was unconvinced regardless, but “the House of Commons [voted] to approve the terms negotiated and for the government to be given the necessary authority to enter into a Treaty of Accession by 356 votes to 244 in October 1971,” paving the way to accession.²⁸ The public was left with their expectations of improved living standards and promise of a thriving economy, mixed with a profound understatement of the complexities of community law at the time and a lack of understanding for the background and context. This set the tone for the continuing disconnect between the UK’s actual relation to the later EU and the public perception of the same within the UK.²⁹

3. Stormy Youth

“The story of ‘Britain and Europe’ has often seemed better suited to the psychiatrist than the historian.”³⁰

The 1970s were a challenging decade for the UK, arguably with or without EEC membership, and arguably because of its disconnection from the Commonwealth. The EEC partners were facing a comparable “economic slump” coinciding with the UK’s accession.³¹ In the UK inflation was high, so was unemployment and the measures introduced by governments to counter both lead to “a wave of union militancy which made [the measures] completely ineffective”.³² The “conflict and class war in industry, a sharp downturn in the economy, a flight to extremism in political life, and a rise in public and domestic violence” were exacerbated instead.³³

While some view this as early evidence of an unrealistic overvaluing of the economic boost any cross-European partnership would ever be able to give, the UK’s situation in the 70’s really represents one of many symptoms following a shock to the world economy as a whole.³⁴ The EEC was in no position to cushion the blow for its members.

The 1975 referendum was proposed at a politically challenging point in the UK’s history, considering the turmoil of economic crisis significantly impacting the UK’s societal structures at home and abroad. It had been mooted by politicians on several occasions and continued to be mooted after the UK finally succeeded and completed its accession.³⁵ The approaching accession accelerated the public debate in the UK and calls for a referendum grew louder in the early 70’s. It was argued that where a general election cannot test consent of the public, a referendum was the only alternative “for voters to intervene”.³⁶ Saunders summarises three streams of thought presenting a referendum as a necessity:³⁷ First, the UK’s constitutional and political framework would be subject to fundamental change with EEC membership. Second, Members of Parliament, borrowing sovereignty from the electorate for their time in parliament, “were exceeding their powers by voting for membership”. Third, a referendum was a potential

²⁷ Lyon, *Constitutional History of the UK* 417 – 418.

²⁸ *ibid.*

²⁹ Matthew Watson, ‘Brexit, the Left Behind and the Let Down: The Political Abstraction of ‘the Economy’ and the UK’s EU Referendum’ (2018) 13 *British Politics* 17; Hobolt, ‘The Brexit Vote’.

³⁰ Saunders, *Yes to Europe!* 31.

³¹ *ibid* 83.

³² Lyon, *Constitutional History of the UK* 420.

³³ Kenneth O. Morgan ‘Britain in the Seventies – Our Unfinest Hour?’ (2017) XXII- Hors série|2017, *Revue Française de Civilisation Britannique* <<http://journals.openedition.org/rfcb/1662>> para 3 accessed 09 October 2020.

³⁴ Baimbridge, Whyman & Burkitt, *Moored to the Continent?* 47; Lyon, *Constitutional History of the UK* 422; Mel Watkins, ‘Seventies: From Boom to Economic Crisis’ (1997) 15 *Compass: A Jesuit Journal* 6.

³⁵ Saunders, *Yes to Europe!* 67 ff.

³⁶ *ibid* 68 – 69 ff.

³⁷ *ibid* 70 ff.

saviour, reinvigorating British democracy, which saw a decline in general election participation also reflecting badly on the results of the two main parties.³⁸

Harold Wilson during his first term as Prime Minister strongly resisted calls for a referendum. He felt that referenda were contrary to UK tradition, undemocratic tools of despots in support of Nazism and Fascism.³⁹ He was thus making a constitutional argument focussing on the UK only and not one in relation to the EEC. Ironically, in his second term, it was Wilson who had to lead the preparations for the 1975 referendum. Labour's "change of persona between government and opposition" created an ambiguous stance on the issue of EEC membership. The Conservative government's efforts in relation to the UK – EU relationship under Prime Minister Edward Heath could not be supported by Labour for domestic political reasons alone.⁴⁰ Supporting the idea of a referendum supported Labour's elections campaign in 1974, which also promised negotiations of terms with the EEC.⁴¹ Agreeing and holding this referendum "constituted a threefold revolution", Wilson's change of heart being one.⁴² Added to that was a fundamental change to the "practice of the British constitution" together with an overturning of "the most basic assumptions of British political thought".⁴³ Saunders sees this as evidence of "the disruptive potential of the European question and its capacity to rewrite the constitutional practice of member states", a fitting summary also when referring to the sister referendum in 2016.⁴⁴

Promises to re-negotiate the terms of membership with the EEC in preparation for a referendum formed part of the UK's election campaign in 1974, particularly on the side of the Labour party.⁴⁵ While what was eventually achieved was approved by the House of Commons, the government remained split on whether these new terms were sufficient or whether "continued EEC membership [was] not only [...] economically disadvantageous, but as damaging to national sovereignty".⁴⁶

A deciding argument for the referendum was the view that if "people are not to participate in this decision, no one will ever take participation seriously again."⁴⁷ Lyon even argues that the referendum came too late for the public: "Membership had not brought the economic advantages claimed, but there was a sense that there was no going back to the pre-1973 position—too many markets had been lost and relations with the Commonwealth were irreparably damaged."⁴⁸ Contrary to Lyon's claim public opinion continued to shift in favour of membership with 31 % thinking UK membership of the European Community was a good thing in September 1973, increasing to 47 % in May 1975.⁴⁹ As the referendum happened, two thirds of the public voted in favour of membership with a turnout of around 64 %.⁵⁰

This was meant to settle the question of membership for the UK once and for all, and the referendum was used as reference point whenever the question of another public vote was

³⁸ *ibid* 69 – 72.

³⁹ *ibid* 64.

⁴⁰ Young, *This Blessed Plot* 271, 275.

⁴¹ Vaughne Miller, 'The 1974-75 UK Renegotiation of EEC Membership and Referendum' (13 July 2015) Briefing Paper Number 7253 House of Commons Library 5 ff <<https://researchbriefings.files.parliament.uk/documents/CBP-7253/CBP-7253.pdf>> accessed 26 October 2020.

⁴² Robert Saunders, *Yes to Europe!* 65.

⁴³ *ibid*.

⁴⁴ *ibid*.

⁴⁵ Lyon, *Constitutional History of the UK* 421.

⁴⁶ *ibid* 422.

⁴⁷ Young, *This Blessed Plot* 275, citing Tony Benn.

⁴⁸ *ibid*

⁴⁹ Miller, 'The 1974-75 UK Renegotiation of EEC Membership and Referendum' 19.

⁵⁰ *Ibid* 25; Lyon, *Constitutional History of the UK* 421

raised in the face of increasing EC power.⁵¹ Indeed, it would take forty years for a referendum on the same topic to feature in an election campaign again.⁵²

4. Leading and Being Led

*“Heavy Fog in the Channel. Continent Cut Off”*⁵³

During the 2016 EU referendum campaign it was continuously claimed, that the UK would be subjected to EU policy and law without real influence or ‘say’.⁵⁴ A particularly striking claim for those UK representatives at work in the EU institutions as they were, at least indirectly, called purposeless.⁵⁵ The claim also stands in direct contrast to the UK’s successful position as EU Member State and yet outside the common currency and Schengen area, both of these being obligatory for candidate countries wanting to join the EU now.⁵⁶

Are there simply two sides to the UK’s story? The one when in Brussels, or Strasbourg for that matter, where UK diplomacy carried weight, the well-respected senior civil servants working closely with their European counterparts, influencing EU policy through the institutions right into the heart of other Member States.⁵⁷ Then the other, at home, where appetite for an ‘ever closer Union’ is as big as that for tea gone cold and where it feels impossible to prove how successful UK representatives are in persuasion and policy making in the UK’s interest.⁵⁸ Arguably, this summary overlooks the differences of opinion within the UK’s own political sphere and societal spectrum. The historically pro-European London would likely take changes in policy and law driven by Brussels better than the English north or Wales, in comparison.⁵⁹

There is also the issue not only of perspective but of approach. If a relationship is mainly viewed through an analysis of costs and benefit, the result may be quantifiable, but is it accurate?⁶⁰ Any analysis of “achievement and failure” in the UK’s policy approaches in the EU “cannot be presented in the form of a simple balance-sheet”.⁶¹ Relying on analysis of Council voting, Member State governments were in opposition in only 2% of votes between 1999 and 2011, counting over 2500 votes.⁶² This can hardly be read as the UK government being mostly outvoted.

⁵¹ Lyon, *ibid* 422.

⁵² David Cameron, ‘EU Speech at Bloomberg’ (2013) <<https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>> accessed 09 October 2020.

⁵³ Maja Kluger Rasmussen, ‘Heavy Fog in the Channel. Continent Cut Off? British Diplomatic Relations in Brussels after 2010’ (2016) 54 *Journal of Common Market Studies* 709, 709.

⁵⁴ ‘The Battle of Evermore, The Referendum Campaign’ *The Economist* (London, 16 June 2016) 24.

⁵⁵ Richard Corbett, former Member of the European Parliament for the UK in a Labour seat, was among the ones most outspoken, setting up his own ‘myth busting’ page <<https://www.richardcorbett.org.uk/category/mythbusters/>> accessed 10 October 2020.

⁵⁶ Robin Niblett, ‘Britain, the EU and the Sovereignty Myth’ (2016) *Research Paper Europe Programme*, May 2016, The Royal Institute of International Affairs, Chatham House; Anand Menon and John-Paul Salter, ‘Britain’s Influence in the EU’ (2020) 236 *National Institute Economic Review* 7; Sara Hagemann, Sara B. Hobolt and Christopher Wratil, ‘Government Responsiveness in the European Union: Evidence from Council Voting’ (2017) 50 *Comparative Political Studies* 850.

⁵⁷ One example being the UK veto to the Fiscal Compact, discussed by Rasmussen, ‘Heavy Fog in the Channel. Continent Cut Off?’ 709 – 710.

⁵⁸ Dragging to the surface the tension between London and Brussels and the diplomacy at work was Lionel Barber, ‘The Men Who Run Europe’ *Financial Times* (London, 11 March 1995) 32.

⁵⁹ YouGov The Times survey on EU referendum voting intention published 18 May 2016 available online <<https://yougov.co.uk/topics/politics/articles-reports/2016/05/18/eu-referendum-remain-lead-four>> accessed 26 October 2020.

⁶⁰ Heavily focussing on such approach are Baimbridge, Whyman & Burkitt, *Moored to the Continent?* 46 ff; Offering an alternative are Menon and Salter ‘Britain’s Influence in the EU’.

⁶¹ Barker, *Britain in a Divided Europe, 1945 – 1970* 291.

⁶² Hagemann, Hobolt and Wratil, ‘Government Responsiveness in the European Union’.

The reality is yet again more complex, as political persona and contrary international and domestic interests come into play. When comparing reports of the UK's engagements with the EU with domestic announcements reporting on the same, the UK representatives duplicity is all too visible.⁶³ This behaviour is as old as the UK's membership, Thatcher being a prominent example who, "as she took Britain further in [the EU], she stoked the fire of those who opposed this every step of the way."⁶⁴ While all of "her political energy was directed against it", Thatcher played an active part in a transforming Union, one of the significant achievements at time being the abandonment of the unanimous vote in the Council.⁶⁵ While 'inveighing' "about the relentless advance of the EU and the restrictions placed on [the UKs] own pursuit of a free market economic as a cure for all domestic evils" Thatcher's actions supported the increase of powers on the then EC side.⁶⁶

The developments ahead of the Maastricht Treaty being ratified in 1993 serve as another example of UK hesitance leading to different versions of membership, seemingly for the UK's benefit and under new leadership of Prime Minister John Major. Whilst the UK fundamentally objected to the idea of a federal Europe from the outset, the other member nations aimed to create a federal Europe in the new treaty.⁶⁷ Federalism for the UK resembled the constitutional arrangements of the USA, Canada or Australia and the UK was strongly opposed to the idea.⁶⁸ The UK did not want to be party to such a relationship but equally was not able to propose an alternative. The solution for the UK was simple and one that would be the UK approach throughout the rest of its membership: the opt out. The UK insisted that Maastricht Treaty did not refer to the creation of a federal Europe explicitly, though the treaty envisaged developing the European Union ever closer with cooperation moving beyond a purely economic focus.⁶⁹

The UK's 'one foot in – one foot out' approach seemed to rely on its diplomatic prestige, which wore thin eventually, as the following example will show. Partners were left feeling like too many favours had been called in and to little benefit was gained in return. One painful example is the UK's short-lived participation in the Exchange Rate Mechanism (ERM) leading to Black Wednesday, effectively preventing the UK from joining the European Monetary Union (EMU).⁷⁰ While this impacted the UK's and European Communities alike, Lyon provides insight into the domestic tensions behind the UK's joining of the ERM, sharing how Prime Minister "Thatcher reacted angrily" at the prospect of "accelerated plans for further monetary integration" shortly after having just joined the ERM with reluctance.⁷¹ Senior ministers openly pointed out how the UK's economic struggles were precisely because of the hesitancy to get involved in the first place.⁷² Aykens, while comparing the reactions to struggles in Italy and Germany at the same time, shows how "there was so little real sympathy for the British after all these years of the kind of tack they had taken. They were on their own".⁷³ Stephens concludes "when the crisis hit in 1992 Britain had no real allies".⁷⁴

⁶³ One example used by Alex Barker relates to Cameron in 2011: "Cameron later said he had 'exercised my veto' on treaty change, but he never actually used those words in the room. The rest of the EU agreed to do a side deal without him, breaking with the convention that the European Council moved as one" in Alex Barker, 'Goodbye Brussels: What I Learnt in Eight Years Covering the EU' *Financial Times Magazine Online* (London, 29 August 2019) <<https://www.ft.com/content/1955d464-c926-11e9-af46-b09e8bfe60c0>> accessed 10 October 2020.

⁶⁴ Young, *This Blessed Plot* 306.

⁶⁵ Ibid.

⁶⁶ Lyon, *Constitutional History of the UK* 422.

⁶⁷ Ibid 424.

⁶⁸ Ibid 423.

⁶⁹ Ibid 424.

⁷⁰ Ibid; Peter Aykens, 'Conflicting Authorities: States, Currency Markets and the ERM Crisis of 1992–93' (2002) 28 *Review of International Studies* 359.

⁷¹ Lyon, *Constitutional History of the UK* 423 - 424.

⁷² Ibid.

⁷³ Aykens, 'Conflicting Authorities' 374.

⁷⁴ Philip Stevens, *Politics and the Pound: The Tories, the Economy and Europe* (Macmillan 1996) 260.

Reputation and diplomatic gravitas are never static, but it is evident how the UK's drive around Europe with the brakes on was exhausting its partners on multiple occasions.⁷⁵ The negotiation rounds before and since the referendum 2016 serve as another exemplar, where the UK often overestimated its own influence and was not reading the room, if indeed anybody was there to be read.⁷⁶ Those working on the ground in Brussels, not politicians focussing on short term goals for party and individual, but civil servants interested in a functioning relationship, were the true heroes of UK diplomacy in the EU, managing carefully the balancing act between whoever was in No 10 and the Brussels machinery.⁷⁷ It is a UK tradition after all, that politicians are not, as one might expect at the forefront of policy making but "rather less gets pushed up to the top" and "much policy is made without having to intrude".⁷⁸ In that it stands almost directly opposite to the EU which, despite all the claims to be "bureaucrat's paradise" most fundamental decisions are left to government representatives in Council.⁷⁹

While it suits the UK to argue that it lacks influence on the EU level, it is its self-centred back and forth approach that in the end serves as self-fulfilling prophecy when the EU relations disappoint.

5. Falling Out with Neighbours

"No. No. No."

*Prime Minister Margaret Thatcher*⁸⁰

Neither of the main UK political parties ever managed to be wholeheartedly convinced that the UK's future would lie within the European Union and not outside, despite "demand for British leadership of a united Europe".⁸¹ In that they truly represent the divide in the electorate and wider public which since at least the early 1990s "remains critical of the EU" always showing sympathy for the option of withdrawal.⁸² Baimbridge et al ask provocatively: "Why does Britain not appear to share the vision of the other member states? Why does the UK so often resist common policies? Why is it that it always seems to be Britain that wants special treatment? Why in spite of its size and international influence is the British government perceived as trying to block or dilute the impact of initiatives from Brussels?"⁸³ When discussing these questions Baimbridge et al do not provide comprehensive answers but manage to touch upon a series of challenges showing that, rather than the UK suddenly falling out with the more passionate Europeans they have also been the rather awkward self-conscious neighbours, eagerly eyeing the blooming roses but with real aversion to any attempt of tackling the thorns. What Baimbridge et al are overlooking are the UK's internal constitutional and political differences in structure and opinion. Just as it is impossible to claim one party represents one particular view on the UK – EU relationship, we cannot claim that Westminster politicians speak for the

⁷⁵ Rasmussen analyses what happens when the 'Council Club Rules' are broken in Rasmussen, 'Heavy Fog in the Channel. Continent Cut Off?', 711 f.

⁷⁶ The picture of PM May waiting alone in a conference room was a striking symbol for the UK's isolated position: Daniel Boffey, 'Excluded, Isolated, Humiliated: a History of May's Visits to Brussels' *The Guardian* (London, 30 June 2019) <<https://www.theguardian.com/politics/2019/jun/30/excluded-isolated-humiliated-history-theresa-may-visits-brussels>> accessed 11 October 2020.s

⁷⁷ Barber, *The Men Who Run Europe*.

⁷⁸ Edward C. Page, *Policy without Politicians: Bureaucratic Influence in Comparative Perspective* (Oxford University Press 2013) 47 ff.

⁷⁹ *ibid* 123 – 124; Andrew Moravcsik, 'Despotism in Brussels: Misreading the European Union' (2001) *May/June Foreign Affairs* 114.

⁸⁰ Hansard HC Deb 30 October 1990 column 869 <<https://publications.parliament.uk/pa/cm/198990/cmhansrd/1990-10-30/Debate-1.html>> accessed 11 October 2020.

⁸¹ Nutting, *Europe Will Not Wait: A Warning and a Way Out* 4.

⁸² Baimbridge, Whyman & Burkitt, *Moored to the Continent?* 46.

⁸³ *ibid* 35.

public view across the country or indeed for the devolved governments in Scotland, Wales and Northern Ireland.

While the 2016 referendum on membership seems to suggest that the most successful claims made by the Leave campaign were those relating to immigration, it is the argument of loss of sovereignty that is as old as the UK – EU relationship.⁸⁴ This does not mean to say that immigration was not a hot topic influencing the UK's view of the EU and its predecessor communities. After all Enoch Powell's infamous Rivers of Blood speech in 1968 coincided with preparations of the UK's accession to the EEC.⁸⁵ However, the issue of perceived immigration versus actual immigration and the complex societal concerns arising for future generations, the Windrush generation being one particular example, provide enough ground for a whole other discourse. Here, the issue of immigration as raised by the referendum campaign, is one feeding into the fear of a weakened UK sovereignty.

Lyon argues "had Britain chosen to join the EEC at its inception, it would have been in a strong position to dictate the form of the organisation and the detailed terms of the Treaty of Rome, and to deal expressly with issues relating to sovereignty which have caused so much difficulty since."⁸⁶ The two entities would have been able to adjust their constitutional settings from the outset, growing together more through subtle reforms than seemingly forced means such as direct effect. Arguably, the lack of a referendum on the UK's accession was another historic misjudgement, showing underestimation of the public's fear of 'foreign rule' and 'loss of sovereignty', consciously put into them during the Second World War.⁸⁷ Baimbridge et al argue that "the notion of an unbroken history", "the lack of invasion, absence of revolution and being an 'old' state in a 'new' world" are all part of the UK's identity.⁸⁸ They go on to explore how "the legacy of empire and the pretence of global influence" are used as explanations for the UK's "non-alignment with the rest of Europe."⁸⁹ Lastly, the "development of a distinctive legal system", very different "compared to other EU nations" will always require the UK "to make major adjustments" in comparison to its neighbours.⁹⁰ This goes beyond "the adversarial system of justice" being "alien to the European inquisitorial tradition" but to a continental European comfort in "general enabling legislation", whereas the UK "relies on common law".⁹¹ The way Baimbridge et al pull on the UK's unique identity has its appeal, but does not fully explain why the UK deserves to be treated favourably in its inward looking approach to pan European cooperation, compared to other nations. After all, every member state arguably surrendered some of its identity to be reborn as part of a Union of states.

More crucially perhaps, Baimbridge et al argue that "the contrasting legal systems" also present "different rights of citizenship".⁹² While "citizens' rights are granted and safeguarded by the state because it is enshrined in a constitutional document " in most continental European countries, in the UK "by contrast, it has been assumed that individuals have the right to do whatever they choose provided law does not explicitly prohibit it."⁹³ Whether the

⁸⁴ Lyon, *Constitutional History of the UK* 417; Matthew Goodwin and Caitlin Milazzo, 'Taking Back Control? Investigating the Role of Immigration in the 2016 Vote for Brexit.' (2017) 19 *British Journal of Politics & International Relations* 450; Matthew Goodwin and Oliver Heath, 'The 2016 Referendum, Brexit and the Left Behind: An Aggregate-level Analysis of the Result' (2016) 87 *The Political Quarterly* 323; Jon Stratton, 'The Language of Leaving: Brexit, the Second World War and Cultural Trauma' (2019) 23 *Journal for Cultural Research* 225.

⁸⁵ Michael Savage, 'Fifty Years on, What is the Legacy of Enoch Powell's "Rivers of Blood" Speech?' *The Guardian* (London, 15 April 2018) <<https://www.theguardian.com/world/2018/apr/14/enoch-powell-rivers-blood-legacy-wolverhampton>> accessed 3 November 2020.

⁸⁶ Lyon, *Constitutional History of the UK* 417.

⁸⁷ *ibid.*

⁸⁸ Baimbridge, Whyman & Burkitt, *Moored to the Continent?* 35.

⁸⁹ *ibid.* 36.

⁹⁰ *ibid.* 37.

⁹¹ *ibid.*

⁹² *Ibid.* 38.

⁹³ *ibid.* 38.

UK's public really has this conscious self-perception is impossible to tell, the issue of citizenship, however, became a prominent topic in the aftermath of the referendum and subsequent withdrawal procedures where significant numbers of public representatives made it known that they had no intention to surrender their EU citizenship lightly.⁹⁴

It is convincing that many, if not all, of the factors above, significantly define the “unique interrelationship” between the UK and the EU and as such arguably always set any attempt of an ever closer Union between both up to fail.⁹⁵

6. Friends with Benefits

“As we leave the European Union, we will forge a bold new positive role for ourselves in the world”.

*Prime Minister Theresa May*⁹⁶

While the 2009 Lisbon Treaty was received with mixed reviews, particularly after its older sister treaty failed the ratification in domestic parliaments, it served to lay the question of withdrawal from the EU to rest by introducing Article 50 TEU.⁹⁷

The question of EU membership was not openly questioned then but the history of the UK – EU relationship, in hindsight, seems to have inevitably led to break-up ten years after Article 50 was introduced. Like every relationship that ended, one can retrospectively argue: ‘It was not meant to be! More kept them apart than united them’.⁹⁸ Indeed, Baimbridge et al argue the case for a solitary journey for the UK in Europe, not isolated but linked to the EU where it suits the fundamentally different economic systems.⁹⁹ Arguably, these fundamental differences go beyond economics to the core of the two political, legal and societal systems.¹⁰⁰

This is also reflected in the way the UK and the EU have approached the former's departure. The process of withdrawal was promised to be complex and difficult and most observers were still surprised by just how painful it seems.¹⁰¹ The UK is on its third Prime Minister since the result of the 2016 referendum and while Prime Minister Johnson ‘got Brexit done’, the future

⁹⁴ Verena K Brändle, Charlotte Galpin, and Hans-Jörg Trenz, ‘Marching for Europe? Enacting European Citizenship as Justice during Brexit’ (2018) 22 *Citizenship Studies* 810, 816.

⁹⁵ Baimbridge, Whyman & Burkitt, *Moored to the Continent?* 23.

⁹⁶ Theresa May's first statement as Prime Minister delivered 13 July 2016 outside Downing Street No 10 printed in Andrew Burner, Nancy E.M. Bailey and Credo Reference, *50 Speeches That Made the Modern World* (Enhanced Credo 2017).

⁹⁷ Lyon asked the question whether lawful withdrawal would ever be possible in 2003 Lyon, *Constitutional History of the UK* 419; Finn Laursen, *The Rise and Fall of the EU's Constitutional Treaty* (Martinus Nijhoff Publishers 2008).

⁹⁸ Saunders, *Yes to Europe!* 31.

⁹⁹ Baimbridge, Whyman & Burkitt, *Moored to the Continent?* 111 ff.

¹⁰⁰ Not to mention the multitude of systems within the intergovernmental structures of the EU and its Member states.

¹⁰¹ Even just triggering the withdrawal process under Article 50/51 TEU and in accordance with the UK constitution was subject to legal challenge: *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union* (Rev 3) [2017] UKSC 5; also among others the contributions in the edited collection by Ahmed and Fahey provide an overview of the impact of withdrawal in Tawhida Ahmed and Elaine Fahey, *On Brexit* (Edward Elgar Publishing 2019); Within that a contribution discussing the impact of the UK's withdrawal on Ireland and Northern Ireland and the implications for the Good Friday agreement by Luke McDonagh, ‘The Constitutional Implications of Brexit’; See also Karl August Prinz von Sachsen Gessaphe, Juan J. Garcia Blesa and Nils Szuka, *Legal Implications of Brexit* (MV Wissenschaft 2018).

relationship of the two divorcees remains unclear. At the time of writing EU law will cease to apply in the UK in under ten weeks' time and benefits of these laws will dry up¹⁰²

Prime Minister Cameron wanted to negotiate a 'better deal' for the UK with the EU before the referendum in 2016 but did not convince enough to further a remain vote in the referendum.¹⁰³ May spent her term as Prime Minister negotiating the non-negotiable behind closed glass doors and triggered the UK's withdrawal process from the EU under Article 50 TEU.¹⁰⁴ Prime Minister Johnson got a version of Brexit done and has spent the transition period in 2020 treading water responding to a global pandemic and managing demands in the negotiation of a new relationship with the EU.¹⁰⁵

Promising the oxymoron of 'having the cake and eating it' became habit in UK politics since the referendum vote and stands as symbol for the UK's self-imposed but impossible balancing act: The electorate needs to be calmed and appeased on the one side, while uncharted territory of negotiation and then future relationship with the EU awaits on the other.¹⁰⁶ It does not help that public opinion on the EU remains diverse within UK opinion polls, making it impossible for any government to feel confident in their policy making and governance.¹⁰⁷ It is striking how little in this process is certain. The Department for Exiting the European Union, specifically formed under May's government, lost eight ministers in under three years, showing how well the diverse public opinion is also represented in politics.¹⁰⁸ The UK's internal conflicts regarding constitutional, political or economic priorities in negotiations of the withdrawal process, and now in relation to a future agreement, are hindering its own success. It cannot go in one direction if its parts are heading separate ways.¹⁰⁹ The referendum vote in Scotland and Northern Ireland differs significantly from that in Wales and England, making it impossible for the UK government to follow one clear political agenda. The UK is continuously forced to engage with painful core questions of its own constitutional identity and legal framework as well as economic structures, hiding the struggles behind claims others are hindering UK progress and preventing this great nation from prospering.¹¹⁰ The UK has not outgrown this version of self-centredness, despite realisations that proactive approaches can be to its benefit, and therefore continues to bring challenges upon itself through self-fulfilling prophecies.

¹⁰² Boris Johnson in the second reading of the European Union (Withdrawal Agreement) Bill repeats his campaign mantra "to get Brexit done": Hansard HC Deb 20 December 2019 vol 669 col 146.

¹⁰³ Eva-Maria Poptcheva and David Eatock, *The UK's 'New Settlement' in the European Union* (2016) European Parliament.

¹⁰⁴ Marlen Heide and Ben Worthy, 'Secrecy and Leadership: The Case of Theresa May's Brexit Negotiations.' (2019) 21 *Public Integrity: Ethical Leadership and the Integrity of Public Institutions* 582.

¹⁰⁵ Arno Hantzsche and Gary Young, 'The Economic Impact of Prime Minister Johnson's New Brexit Deal.' (2020) 250 *National Institute Economic Review* F34.

¹⁰⁶ Andreas Musolff, 'Having Cake and Eating It: How a Hyperbolic Metaphor Framed Brexit' (*LSE Brexit Blog*, 12 February 2020) <<https://blogs.lse.ac.uk/brexit/2020/02/13/having-cake-and-eating-it-how-a-hyperbolic-metaphor-framed-brexit/>> accessed 12 October 2020.

¹⁰⁷ Deltapoll for Mail on Sunday 28 September 2020 available online <<http://www.deltapoll.co.uk/polls/latest-voting-intention-25th-september>> accessed 26 October 2020.

¹⁰⁸ Robert Merrick, 'Chris Heaton-Harris: Brexit Minister Resigns in Protest at Theresa May Extending Article 50' *The Independent* (London, 03 April 2019) <<https://www.independent.co.uk/news/uk/politics/chris-heaton-harris-resigns-brexit-minister-theresa-may-delay-article-50-corbys-a8853126.html>> accessed 12 October 2020.

¹⁰⁹ Among others: Edwin Parks and Carol Howells, 'The Repatriation of Exclusive Competences From EU in Post-Brexit United Kingdom' in Karl August Prinz von Sachsen Gessaphe, Juan J. Garcia Blesa and Nils Szuka *Legal Implications of Brexit* Hagener Rechtswissenschaftliche Schriften 2 (MV-WISSENSCHAFT 2018).

¹¹⁰ Boris Johnson, 'Prime Minister Address to the Nation (31 January 2020)' <<https://www.gov.uk/government/speeches/pm-address-to-the-nation-31-january-2020>> accessed 12 October 2020. The challenges around devolution are one area where the UK government has been remarkably reluctant to engage. More strikingly, the issues around the Irish border have only been engaged with when forced so. An urgent question in the House of Commons by Louise Haigh seeking confirmation for "the UK's commitment to its legal obligations under the Northern Ireland protocol" serves as an example Hansard HC 08 September 2020 Vol 679 Col 497.

In the end “perceptible rise in Euroscepticism” and the “public disenchantment with the EU” are the result of political mismanagement more than economic, political or legal truths.¹¹¹ Without really understanding how its own internal conflicts impact on any future relationship with the EU, the UK attempts to further new relations. In doing so it is looking to receive the same benefits without any of the obligations it evaded to sell to the public domestically in the first place. It seems to have learned half a lesson, in that it is not seeking to hide these obligations from its people. Rather than addressing the fact that an agreement reached between the EU and the UK will of course need to benefit both sides, the UK continues to seek the impossible: An international agreement benefitting itself, while forcing obligations only on the EU. The present back and forth between UK and EU could continue ad infinitum, if it were not for economic crisis and general elections to intervene.

7. The year 2070

“The UK's commitment to Europe cannot be measured simply by its relationship with the EEC.”¹¹²

Maybe Churchill was right back in 1930 when he proclaimed the UK was “with Europe but not of it.”¹¹³ Throughout its history, the UK considered itself unconcerned by the crises that shook the continent, unless they came knocking on their door. They had to cross the channel first, after all.

The UK had mastered being a global conquer, grew an empire and still mourns its loss in many respects. This Union of European States was simply not falling for the UK's grandeur and it could have all been such a wonderful ‘European Commonwealth’ under UK leadership.¹¹⁴ The UK is an extraordinary partner when a crisis does not directly concern them, providing support at arm's length, or leadership from the top, depending on the perspective taken. It does, however, get complicated when it is asked to give something for when it takes, not out of malice, but habit.

This chapter has shown how the starting points of the founding EC member states and the UK differ so dramatically; they could hardly have been further away from one another. Those joining the founding European Coal and Steel community did not choose to do so for the greater good; there was no common market to benefit from, no sovereignty to lose, no constitutional tradition challenged. The continent literally lay in ruins, was governed by the Allies and it was clear who were the bigger and the smaller spoons at the table, as the new borders were drawn. In order to prevent nations ever choosing the option of conflict over the option of cooperation, they had to be connected where it hurt them most in a crisis: their wallets. Creating interdependencies would intertwine the fate of these nations, never to be separated again.

The stabilising effect to these economies through cooperation was what the UK was really interested in, so long as it fitted the UK's ‘gentleman approach’.¹¹⁵ It did not want to be forced but prided itself in being forceful. Thatcher's confrontational method's won small victories and “cashed in a lot of chips, in a game where every player has only a limited number and can't

¹¹¹ Baimbridge, Whyman & Burkitt, *Moored to the Continent?* 34-35.

¹¹² Saunders, *Yes to Europe!* 33.

¹¹³ Morrissey, *Churchill and de Gaulle The Geopolitics of Liberty* 96.

¹¹⁴ Mourning the lack of UK leadership in Europe: Anthony Nutting, *Europe Will Not Wait: A Warning and a Way Out* (Hollis & Carter 1960) 103; Saunders even refers to the accession of the UK to the then EC as the new British empire in Saunders, *Yes to Europe!* 254.

¹¹⁵ Young, *This Blessed Plot* 330 f.

acquire more by simply shouting.¹¹⁶ It is a record, “not of triumph, but [bewilderment]” as it seemed impossible for the UK to “truly accept that its modern destiny was to be a European country.”¹¹⁷ Saunders therefore concludes that the UK “features less as a rational actor on the world stage than as a trauma victim, strapped to the analyst's couch.”¹¹⁸

There is evidence that nothing much has changed since those founding years. May's “discursive construction of Brexit” is said to have contributed to “political paralysis”.¹¹⁹ The jury is still out on Johnson, while he continues applying comparable rhetoric.¹²⁰ It seems “differences in history, culture and political traditions” are insurmountable and will continue to make “for ill at ease bedfellows.”¹²¹

The UK's “unbroken history” and “legacy of empire” cannot be overcome by political compromise of sorts.¹²² Politics is short-lived compared to world history and while the idiom promises it will repeat itself we only ever really know with the benefit of hindsight whether it truly has. It is easy to blame the UK for its self-centredness, but the same needs to be said for the EU. Fortress Europe cannot afford to surrender its identity of unity and complex diplomacy in the face of member state self-interests either, or it will risk their smaller entities bit by bit chipping away until the fundamental core, the single market and its four freedoms, is a meaningless shell.¹²³

Stalemate.

Arguably, but there is no reason why a reboot would be indefensible. Neither UK nor EU can escape their individual contexts but can ground their future relationship in a clearly defined and carefully chosen unique setting belonging to them only. Joining the early European Communities would have allowed the UK to shape the EU in a way that would have suited itself, there is no doubt. That does not mean, however, that a newly founded co-operation cannot grow into a firm and stable co-operation in which both parties prosper. In a way, the withdrawal process laid bare many of the hidden constitutional, political and societal challenges. Now in the open, these can be addressed directly and purposefully.

Any future co-operation needs to acknowledge the other parties starting point, if it wants to ever be a serious and valuable endeavour. The UK needs to fully accept that the single market cannot be undermined through any attempt of ‘cherry picking’; It either is committed to full access including all its advantages and constraints, or it accepts it will have to pay extra for the privilege of limited access and limited risk.¹²⁴ The EU on the other hand has to understand the UK's constitutional and political framework has not grown and matured through forced revolution, war and reform but is the result of centuries of slow reactionary change in common law with its identity firmly rooted in parliamentary sovereignty.¹²⁵ It is therefore not as amenable to EU law mechanisms such as regulations and ECJ case law as the legal frameworks of the

¹¹⁶ *ibid* 325.

¹¹⁷ *ibid* 1.

¹¹⁸ Saunders, *Yes to Europe!* 31.

¹¹⁹ Monika Brusenbauch Meislova, ‘Brexit Means Brexit—or Does It? The Legacy of Theresa May's Discursive Treatment of Brexit’ (2019) 90 *The Political Quarterly* 681, 682.

¹²⁰ YouGov ratings show a 40% approval rate compared to 39% negative opinion in polls conducted between July and October 2020: <https://yougov.co.uk/topics/politics/explore/public_figure/Boris_Johnson> accessed 12 October 2020.

¹²¹ Baimbridge, Whyman & Brian Burkitt, *Moored to the Continent?* 166.

¹²² *ibid*.

¹²³ Colin Egan and Peter McKiernan, *Inside Fortress Europe: Strategies of the Single Market* (1994) EIU series Economist Intelligence Unit; Brian T. Hanson, ‘What Happened to Fortress Europe?: External Trade Policy Liberalization in the European Union’ (1998) 52 *International Organization* 55.

¹²⁴ Stefan Tangermann, ‘Brexit and Cherry Picking: Who's Afraid of the Big Bad Wolf?’ (2018) 17 *EuroChoices* 47.

¹²⁵ Michael Gordon, ‘Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit’ (2019) 30 *King's Law Journal* 125.

founding member states. The EU has created unique legal mechanisms in its founding years and there is no reason why a new partnership with the UK would not lead to the same.

This new fundamental understanding on both sides is essential to then appropriately contextualise the negotiations as the new relationship is defined and structured. The UK has to stop looking for versions of existing deals, longing for a Swiss approach yesterday only to be discussing a confusing version of Canada + + the next.¹²⁶ The EU has to overcome its internal diplomatic slow motion and the urge to fit agreements in a pre-set box to ensure approval in all member states. The seemingly impossible task of a compromise that leaves every participant thinking they have won needs to be abandoned for the benefit of a compromise that leaves all feeling they have not been short-changed.

The EU was founded in the aftermath of the second world war and took decades to develop into its current format, through a mix of gentle diplomacy in the establishment of intergovernmental structures or sledgehammer decisions by the Court of Justice of the European Union. It is challenged by environmental threats, refugee movements and global events such as struggling economies facing a pandemic. Judging by the previous 50 years, the EU is likely to push for more cooperation closer to its citizenry. This approach can suit a UK that honestly seeks a demos governed Union, applying powerful representation and therefore delivering strongly legitimised legal mechanisms.

The UK on the other hand is priding itself in its uninterrupted history and Brexit is pulling at the seams of the Union between England, Wales, Scotland and Northern Ireland. 50 years from now, we may well see a united Ireland, an independent Scotland and an empowered Wales, leaving England to maybe consider the establishment of its own assembly.¹²⁷ The UK's history shows, however, that fundamental change is rare and subtle reforms over time more likely. The way the UK will be able to engage with the EU will depend enormously on its internal structures and the distraction these pose.

While the pandemic challenges our globalised approach to economies, politics and citizenry, the interconnectivities and dependencies have only become more visible. As some of these have grown slowly as part of the UK's EU membership, it remains to be seen how much of this almost organic development the UK chooses to explicitly reject as it develops the post-EU version of itself. As the global challenges remain, it is likely that as EU and UK respond to these a renewed cooperation feeds into the formation of a new version of EU – UK relations.

The UK and the EU can grow to become effective partners, furthering economic integration without intense constitutional intervention, so long as they accept how far the other party is willing to go. Then maybe, as the EU undergoes its long overdue reforms with the UK watching from the outside, and while the UK tests the cold water of globalised economies without the backing of an empire, both sides will realise that context matters, but can be overcome for a agreed version of a greater good. It may take another 50 years; let's put a holder in our diaries for 2069 and see.

¹²⁶ Paul Whiteley, 'Is Britain Heading for Canada Plus Plus Brexit?' (*The Conversation*, 13 December 2018) <<https://theconversation.com/is-britain-heading-for-canada-plus-plus-brexit-108782>> accessed 12 October 2020.

¹²⁷ Nicola McEwen, 'Negotiating Brexit: Power Dynamics in British Intergovernmental Relations' (2020) *Regional Studies* 1; Gerard McCann & Paul Hainsworth, 'Brexit and Northern Ireland: The 2016 Referendum on the United Kingdom's Membership of the European Union' (2017) 32 *Irish Political Studies* 327; John Temple Lang, 'Brexit and Ireland' (*European Parliament*, 13 December 2017) <<https://op.europa.eu/en/publication-detail/-/publication/4acca516-d651-11e7-a506-01aa75ed71a1/language-en>> accessed 3 November 2020; Andreas Rahmatian, 'Brexit and Scotland: Centralism, Federalism or Independence?' (2018) 26 *European Review* 616.

Chapter 4

From the Greek Case to the Present: 50 Years of Article 3 of the European Convention on Human Rights

Neil Graffin

Abstract

This chapter will look at the development of Article 3 of the European Convention on Human Rights, which concerns the prohibition of torture and inhuman and degrading treatment or punishment, from the first finding that it had been breached in 1969 in the Greek case, to the current time. It will focus on how the Article came to be treated as prohibiting different categories of harm in the Greek case and *Ireland v UK*, of torture, inhuman treatment or punishment, or degrading treatment or punishment. It will assess when the European Court has been willing to find a breach of the provision, with respect of these categorisations over a 50-year period. The chapter will argue that the Court has been willing to find the provision breached in a wide range of cases, beyond much more than what one imagines its drafters had envisaged. At the same time, the Court has sought to set parameters for the reach of the Article. This chapter will finish by considering some of the potentialities for Article 3 by considering the plight of migrants trying to make their way to Europe, while recognising its failures to protect these people.

1. Introduction

Article 3 of the European Convention on Human Rights (ECHR) states:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.¹

Applying to all human beings, it has been said to be absolute – that is, it cannot be derogated from, qualified or limited in any way.² The brevity and *prima facie* simplicity of the text of the Article belie its complexity. In the *Greek case*,³ where a violation of Article 3 was found for the first time, the Article was understood as encompassing different component parts, all of which are defined, and conceptually limited by the practice of the Court. In the seminal case of *Tyrer v United Kingdom*⁴ the European Court of Human Rights ('the European Court') stated that the ECHR was a 'living instrument which... must be interpreted in light of present-day conditions'.⁵ The mission of the human rights programme is embodied within this statement. Human rights should respond to social change but do so in a way which is progressively moving towards better protection. Although we may be living in times which regrettably have

¹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

² DJ Harris, M O'Boyle, E Bates, C Buckley, *Law of the European Convention on Human Rights* (OUP 2018) 237.

³ *The Greek Case*, Report of 5 November 1969, (1969) 12 *Yearbook of the European Convention on Human Rights* 186.

⁴ *Tyrer v United Kingdom* (1978) 2 EHRR 1.

⁵ *Ibid*, para 31.

witnessed the regression of human rights standards with regards to, for example, responding to terrorism, migration or economic inequality, the aspirational nature of the human rights programme has been evident in the case law of Article 3 of the Convention, even if sometimes it falls short.

It would be difficult to argue that the Article has been applied in anything other than a wider range of forms of ill-treatment, with applications in fields including within crime prevention, asylum cases, extradition, police interviewing, corporal punishment, penal environments, *amongst others*. It may also have been applied to much lesser forms of ill-treatment than was originally envisaged. Yet the last 50 years have shown it cannot protect everyone from harmful ill-treatment by the state. The provision has its limitations, and the Court has set parameters as to when the prohibition applies or not. The aim of this review article is to survey 50 years of Article 3, from the *Greek case* in 1969, through to 2019. In doing so, it will look at the drafting of Article 3, early cases before the Commission and Court, as well as some key areas where we can see the development of the case law of the provision. It will spend some time looking at the early seminal cases of the Court – the *Greek case* and *Ireland v UK*,⁶ and it will also assess the recent revised judgment of *Ireland v UK*.⁷ It will consider the definitions of ‘torture’, ‘inhuman treatment or punishment’ and ‘degrading treatment or punishment’, with additional attention paid to the line between acceptable and unacceptable harms committed against persons. It will examine how the concept of human dignity has been used to expand the ambit of the prohibition and argue, contrary to the view of theorists who consider ‘dignity’ to be too intangible to form the basis of legal obligation, that it is a concept with aspirational qualities which has use for modern jurists. The last section regarding how Article 3 has been applied with regards to migration allows a short exploration of the limits of the Article, as well as its potentialities. Given the potential breadth of a review article on 50 years of Article 3, it should be noted from the outset that this cannot be a comprehensive exploration. This is too short a publication to give this study justice, and some important cases may be omitted from discussion. Nevertheless, the cases included have been carefully chosen to trace the development and shaping of Article 3.

2. The Early Judgments – the *Greek Case* and *Ireland v UK*

The drafting of Article 3 ECHR appeared not to provoke controversy, but there was little light shed on how the provision was to be used, and no indication given to what it would become. Before arriving at the final wording of the Article, several different suggestions were made, including by the UK delegate, Seymour Cocks, who argued that the provision should mention mutilation, sterilisation, beating, torture, as well as imprisonment with excess of light, darkness, noise as to cause mental suffering.⁸ Although not adopted, these suggestions help to inform our understanding of the range of harms Article 3 was originally intended to encompass.

The final text which was adopted was very similar to that within the Universal Declaration of Human Rights (UDHR), but there is no indication from the *travaux préparatoires* as to whether they had considered the suitability of the terms ‘torture’ ‘inhuman’ and ‘degrading’ within the provision, or what they meant. The UDHR text itself was passed without unanimous agreement on the inclusion of the terms ‘inhuman’ or ‘degrading’, and with no guidance as to their scope or applicability. The UK delegate to the drafting of the instrument, for example, found the term ‘inhuman’ to be too subjective.⁹ In addition, the UDHR was never supposed to be a source of legal obligation. Later, during the drafting of Article 7 of the International

⁶ *Ireland v UK* (1978) 2 EHRR 25.

⁷ *Ireland v United Kingdom*, Application no 5310/71, Judgment (revision) of 20 March 2018.

⁸ European Consultative Assembly Deb., 1st Session (Part II) 596 (Sept 8, 1949); Klayman, ‘The Definition of Torture in International Law’ (1978) 51 *Temple L Q* 472.

⁹ E/CN.4/AC.1/SR.30.

Covenant on Civil and Political Rights 1966 (ICCPR)¹⁰ delegates also expressed misgivings about the content of the wording of the prohibition and spoke of the need for greater specificity.¹¹ In particular, the word 'degrading' was deemed to be vague.¹²

It seems unlikely that the architects of Article 3 would have been aware that the provision would be held applicable in such a broad range of circumstances. However, divining the original intention of the drafters of the Article is insufficient for a proper understanding of its meaning in contemporary international human rights law, as human rights protections are conceived as living instruments. Focusing on the purpose of the drafters wrongly assumes that drafters have clearly defined ideas of all the intentions and potential interpretations of a provision. We know that is not the case.¹³ Article 3, thankfully, has developed to encompass a wide-range of circumstances, providing protection from many forms of harm. In common with the other provisions in the ECHR, the evolving case law of the European Court has informed our understanding of what Article 3 is meant to prohibit. Given a relatively blank canvas to develop Article 3, the early cases have been particularly influential in shaping how the Article is applied by the Court.

The first breach of Article 3 was found by the European Commission in 1969. In the Spring of that year a military *coup d'état* brought Colonel George Papadopoulos to power in Greece. Throughout the next seven years Greece was subject to military rule and the security forces used torture extensively. Amnesty International conducted investigations into reports of torture which led to the governments of the Netherlands, Sweden and Denmark to claim violations of seven separate Articles of the ECHR, including Article 3, against the Greek state. In the *Greek* case, it was reported that a large variety of methods of torture had been used, including *falanga*,¹⁴ sexual abuse, near suffocation, *strappado*,¹⁵ beating with sandbags or knotted wires, jumping on the stomach, pulling of hair, extraction of finger and toe nails, burning, and electric shocks. It was not surprising in this case that a breach of Article 3 was found. In finding a breach, the European Commission introduced what would become the core constituents in our understanding of Article 3. Since this case, Article 3 has been understood to split into different parts, with a hierarchical progression between torture, inhuman treatment or punishment and degrading treatment or punishment (although this may not be borne out in practice with regards to degradation, as described in the section below):

The word 'torture' is often used to describe inhuman treatment which has a purpose such as the obtaining of information or confessions, or the infliction of punishment and is generally an aggravated form of inhuman and degrading treatment.¹⁶

The view that torture was inhuman treatment with a purpose was subsequently amended in *Ireland v UK* (1978), another early seminal case in developing our understanding of the provision. During the period known as The Troubles in Northern Ireland, the UK government arrested hundreds of men as part of Operation Demetrius in 1971. Of these, fourteen men were taken to an additional interrogation centre and were subjected to ill-treatment by the security forces. Five techniques were used against the individuals, including making them

¹⁰ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999 171.

¹¹ Klayman 'The Definition of Torture in International Law' 462.

¹² E/CN.4/SR.141, 3.

¹³ For more on issues such as this see: M Davies, *Law Unlimited* (Routledge 2017) 46.

¹⁴ Repeated action of blunt trauma to the feet.

¹⁵ The victim's hands are tied behind his or her back and suspended by a rope.

¹⁶ The *Greek* case.

stand in stress positions,¹⁷ placing hoods over their heads (they became known thereafter as the 'hooded men'), subjecting them to loud noise, depriving them of sleep, and depriving them of food and drink.¹⁸ In this case it was found that the five techniques amounted to inhuman treatment. In doing so, the Court disregarded the distinction made in the *Greek* case that torture was inhuman treatment with a purpose and argued that it was severity of suffering which was the distinction between torture and inhuman treatment. Following this case, it would be considered by many that there was a hierarchical progression of severity of suffering within Article 3 of the Convention with torture at the top of the hierarchy and degrading treatment at the bottom.¹⁹

'...it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering'.²⁰

Recently, scholars have called into question the notion of a hierarchical progression of severity of suffering. Mavronicola argues, 'the terms 'inhuman' and 'degrading' encompass acts with distinct qualities, with potentially distinct effects on the victim',²¹ therefore arguing that degradation is a different form of ill-treatment to inhuman treatment rather than one separated by severity of suffering. Similarly, Webster argues that 'Article 3 is constituted by forms of harm that are connected yet distinctive. They are connected because they make up one holistic legal standard and presumably share some common conceptual ground, and they are distinctive because the text of the Convention uses several terms within this single right...'²² This indicates that the different constituent parts of Article 3 have different conceptual meanings, rather than being strictly separated by severity of suffering. Under this view, it may be the case, for example, that we might find something which is degrading to engender greater suffering than something which is found to be inhuman treatment. Given that suffering is subjective, it would seem difficult to argue that all degrading treatment, for example, causes less severe suffering than inhuman treatment. We may find cases where we could imagine that this does not hold up to scrutiny. We can also see certain concepts used frequently to describe specific types of ill-treatment. For example, surveying cases of the Court, it can be observed that detention conditions are always held to be degrading treatment, inhuman treatment, or inhuman or degrading treatment, but never torture.²³ Nevertheless, it does appear *prima facie* that severity of suffering still has its place in distinguishing between the different concepts – degradation still often appears as a gateway into the provision, and torture describes what we might imagine to be the most severe types of suffering.

The *Ireland v UK* case was widely criticised due to the narrowness of the interpretation of what constituted torture.²⁴ It was felt that the five techniques were torture, and not inhuman and degrading treatment. Possibly the European Court may have been responding to the situation in Northern Ireland where a state of emergency had been declared, and the decision was a political one. The case was re-opened in 2018 to reconsider whether torture had taken place.²⁵

¹⁷ The men were described as having to stand 'spread-eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the finger'.

¹⁸ The *Greek* case, para 96.

¹⁹ M Evans and R Morgan, *Preventing Torture* (OUP 2001) 289.

²⁰ *Ibid*, para 167.

²¹ N Mavronicola 'Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context' (2015) 15 *Human Rights Law Review* 721, 725.

²² E. Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law* (Routledge 2018), 21.

²³ Harris et al, *Law of the European Convention on Human Rights* 261.

²⁴ M O'Boyle, 'Torture and Emergency Powers Under the European Convention on Human Rights: *Ireland v United Kingdom*' (1977) 71 *American Journal of International Law* 674, 684-88.

²⁵ *Ireland v United Kingdom*, Application no 5310/71, Judgment (revision) of 20 March 2018.

It is worth considering this recent case as in some famous examples the narrow interpretation of torture held in *Ireland v UK* has been used to justify the ill-treatment of detainees. For example, this happened in Israel under the Landau Commission,²⁶ or in the United States (and Guantanamo Bay) through the Bybee Memorandum.²⁷ In the revised judgment, the Court decided not to revisit their decision. However, this was not on the basis that it considered that the five techniques did not amount to torture. Rather a decision to revise a case is based on a technical process undertaken pursuant to Rule 80 of the Rules of that Court. This allows reconsideration of a judgment should new facts emerge which *would have had* a decisive influence on the Court. The focus under the review procedure was not whether the five techniques could be viewed to be torture nowadays. The review procedure seeks to ascertain whether the Court in 1978, when the judgment was made, would have decided the case differently and held the treatment to be torture if they had the documents which have recently been uncovered. The Court in the revised judgment did not consider that the emergence of the documents would have had a decisive influence on the Court's findings and therefore dismissed the case.²⁸

If the decision by the Irish government to apply to revisit *Ireland v UK* had the aim of righting an historic wrong, it was ill-conceived. First, if we consider the influence that the case had in Israel and the US, there were a multitude of arguments presented by both the Landau Commission and in the Bybee memorandum, many of which were considered by the human rights commentariat as entirely wrong, illegal, or politically motivated. The inclusion of the judgment in *Ireland v UK* was presented as only one of several (sometimes perverse) reasonings for permitting ill-treatment. Second, a revision request under Rule 80 is not an opportunity to fix the Court's past mistakes but is a technical process which allows a case to be reconsidered should new *decisively influential* evidence be presented. As the Court stated it is '...not for the Court... to apply retrospectively Article 3 case-law on what is now considered to constitute torture'.²⁹ Should the Court do that, apart from breaching its own rules, it would lead to uncertainty and could add to the increasing backlog of cases for the already overburdened Court.³⁰ Although *Ireland v UK* is an influential case, if we consider that there have been 2404 breaches under the substantive head of Article 3 from 1959 to the time of the writing of this article, we could see the potential for chaos.³¹

Third, the European Court had already decided that the decision in *Ireland v UK* would not hold up, considering that the case included an overly narrow interpretation of torture when it was decided. In the case of *Selmouni v France*³² the applicant was beaten in police custody, called on to perform oral sex on a police officer, and when he refused to do so, had been urinated upon and threatened with a blow torch and a syringe. The Court, dismissing the Government's argument that the ill-treatment did not amount to torture, which relied on the fact that the judgment of *Ireland v UK*, stated that 'certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future'.³³ This case is quoted in the revised *Ireland* judgment, where it additionally states that the case-law on the notion of torture has evolved.³⁴ Should the same facts come before the Court nowadays there undoubtedly would be a finding of torture. The jurisprudence

²⁶ B'TSelem, 'Legislation Allowing the Use of Physical and Mental Coercion in Interrogations by the General Security Service' (2000), available at: <www.btselem.org> accessed 10 July 2019.

²⁷ August 1st, 2002 Department of Justice Memorandum Regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340 – 2340A Assistant Attorney-General for the Office of Legal Counsel at the US Department of Justice, Jay S. Bybee, to Alberto Gonzales, Counsel to the President of the United States.

²⁸ *Ibid*, para 137.

²⁹ *Ireland v United Kingdom*, Application no 5310/71, Judgment (revision) of 20 March 2018, para 10.

³⁰ Council of Europe, *European Court of Human Rights Annual Report 2018*, (COE 2018) 13.

³¹ *Ibid*, 179.

³² *Selmouni v France* (2000) 29 EHRR 403.

³³ *Ibid*, para 101.

³⁴ *Ireland v United Kingdom*, Application no 5310/71, Judgment (revision) of 20 March 2018, para 60.

of the Court had already evolved, as indicated in the case of *Selmouni*, demonstrating the progressively shifting reach of the prohibition, thereby not necessitating that the case should be revisited.

3. Torture

It took the European Court until *Aksoy v Turkey* in 1996 to find a state had committed torture.³⁵ In this case, the applicant's arms were paralysed after he had been stripped naked and suspended by his arms, which had been tied behind his back. Since 1996, 152 further breaches of Article 3 amounting to torture have been found. Given the fact that all findings of torture have been made in the last 23 years, this might show a greater willingness of the Court to find torture has taken place, as opposed to a lesser finding such as inhuman treatment. This may be correct, although it is notable that the Russian Federation – who have been found to have tortured in 63 cases – did not ratify the ECHR until 1998. Further analysis of the cases may be required to ascertain whether the line between inhuman treatment and torture has moved, so that acts previously considered to fall under the former heading are now considered to amount to torture.

Torture has been found in a variety of contexts, mostly in cases where multiple types of ill-treatment have been inflicted to the applicants. For example, a regime of solitary confinement and severe abuse can amount to torture. In the case of *Ilaşcu and Others v Moldova and Russia*,³⁶ the applicant was savagely beaten in a Russian prison. He was threatened with death, denied food for two days, and light for three. The applicant was also subjected to four mock executions. In this case, the Court found that there was a breach of Article 3 amounting to torture. However, in an early torture case, in 1997, it was found in *Aydin v Turkey*³⁷ that a single act of rape can constitute torture.

The Court has also held that the infliction of mental suffering can form part of a claim of a breach of Article 3, but to date has not found that mental suffering on its own amounts to torture.³⁸ This may seem surprising given the aims and effects of some types of mental harm illegally inflicted on individuals. For example, the deprivation or bombardment of noise and light to the senses, for example, has been known to cause aggression, anxiety, stress and hallucinations increasing the risk of heart disease or attack,³⁹ yet there is no judgment which says on its own that this amounts to torture. It may be the case that the European Court does not view these types of behaviours to be sufficiently severe to amount to torture. On the other hand, cases where one method aimed at inducing mental suffering has been used on its own are a rarity, so it may be that the Court has not had the chance to pronounce judgment on the form of ill-treatment. This is a limitation of Article 3, and of human rights courts (and courts) in general – they principally work on a reactive basis where they can only pronounce judgments on the infringement of laws when cases are before them (although persuasive comments can be made *obiter*). The Court, for example, has not had to adjudicate upon a case where sensory deprivation is the only factor under consideration. Therefore, for human rights jurists trying to ascertain what might fall under each heading, it can be part guesswork and part analyses of cases where one attempts to imagine comparable levels of harm, suffering or wrongdoing.

³⁵ *Aksoy v Turkey* (1997) 23 EHRR 553.

³⁶ *Ilaşcu and Others v Moldova and Russia* (2005) 40 EHRR 46.

³⁷ *Aydin v Turkey* (1997) 25 EHRR 251.

³⁸ Harris, M O'Boyle, E Bates and C Buckley, *Law of the European Convention on Human Rights* (Oxford 2009) 75.

³⁹ J Mendelson, P Kubzansky, PH Leiderman, D Wexler, C DuToit and P Solomon, 'Catecholamine Excretion and Behaviour During Sensory Deprivation' (1960) 2(2) *AMA Arch Gen Psychiatry* 147; Z J Lipowski, 'Sensory and Information Inputs Overload: Behavioural Effects' (1975) 16 *Comprehensive Psychiatry* 199; Physicians for Human Rights and Human Rights First, *Leave No Marks: Enhanced Interrogation Techniques* (Physicians for Human Rights and Human Rights First, 2007).

4. Inhuman Treatment or Punishment

For ill-treatment to be 'inhuman' it must 'attain a minimum level of severity'.⁴⁰ The category of 'inhuman treatment or punishment' has not found itself to be subject of conceptual deliberation in the same way that, for example, degrading treatment or punishment has. Evans and Morgan discuss inhuman treatment as a 'residual category'⁴¹ – somewhere between torture and degrading treatment with no formal characteristics of its own. It is differentiated from torture by the severity of suffering of an individual. One can ascertain the parameters of both inhuman treatment and punishment by looking at the practice of the Court. Often a finding of 'inhuman and degrading' treatment may be found, or a finding of 'inhuman treatment' may be found on its own. The Court does not indicate why it has found that degradation is a component in a finding of 'inhuman and degrading' treatment.

In the 50 years since the *Greek* case, a wide-ranging amount of cases have been held to amount to inhuman treatment. Unlike torture, mental suffering on its own has been found to amount to inhuman treatment.⁴² Some notable cases include *Jalloh v Germany*⁴³ where it was held that the insertion of a tube into a person's throat, as well as the administering of an emetic fluid, to force that person to vomit a suspected package of drugs amounted to a breach of Article 3. In *Selçuk and Asker v Turkey*,⁴⁴ there was inhuman treatment when, as part of a security operation, an elderly person's home was destroyed in their presence without regard to their safety, livelihood or shelter. In *Gäfgen v Germany*⁴⁵ there was inhuman treatment when the applicant was threatened with 'intolerable pain' unless he revealed the whereabouts of a kidnapped boy. The concept of 'inhuman punishment' is otherwise relatively underdeveloped. Often the Court will find 'inhuman treatment and punishment' but there is no clear indication given as to why that might be the case.⁴⁶ Cases involving corporal punishment usually are considered to amount to degrading punishment, but often do not reach the threshold to be 'inhuman'.⁴⁷

5. Degrading Treatment and Punishment

Treatment is degrading if it 'is such as to arouse in the victims, feelings of fear, anguish and inferiority capable of humiliating and debasing them'.⁴⁸ The Court has also said of degrading treatment that it 'humiliates or debases an individual, showing a lack of respect for, or diminishing, their human dignity, or when it arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'.⁴⁹ The assessment of what constitutes degradation, like breaches of Article 3 in general, is relative – it depends on the circumstances of the case.⁵⁰ Degradation is a slippery concept, and the general relativeness of the provision has the potential to call into question the absoluteness of Article 3 (this will be discussed below).⁵¹

⁴⁰ *Ireland v UK* (1979) 2 EHRR 25, para 16.

⁴¹ Evans and Morgan, *Preventing Torture*, 93.

⁴² *Selçuk and Asker v Turkey* (1996) 26 EHRR 477.

⁴³ *Jalloh v Germany* (2007) 44 EHRR 32.

⁴⁴ *Selçuk and Asker v Turkey* 1998-II; 26 EHRR 477.

⁴⁵ *Gäfgen v Germany*, (2010) 52 EHRR 1.

⁴⁶ Harris et al, *Law of the European Convention on Human Rights* 91.

⁴⁷ Evans and Morgan, *Preventing Torture* 93.

⁴⁸ *Ireland v UK* (1979) 2 EHRR 25, para 167.

⁴⁹ *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgment of 21 January 2011.

⁵⁰ *Ireland v UK* (1979) 2 EHRR 25, para 167.

⁵¹ For further discussion see: S Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law? A Reply to Graffin and Mavronicola' (2018) 18 *Human Rights Law Review* 297; N Graffin, 'Gäfgen v Germany: The Use of Threats and the Punishment of Those Who Ill-treat During Police Questioning: A

Many of the early cases concerned degrading punishment, as opposed to treatment. For example, in *Tyrer v UK*⁵² the Court held that a sentence of three strokes of the birch to a juvenile, to be conducted publicly, was degrading punishment. The Court found in *Costello-Roberts v UK*⁵³ that a 7-year-old boy being, in private, whacked on the bottom, over his trousers, with a shoe did not amount to degrading punishment. Degrading treatment has been found in cases conditions to detention, including, for example poor sanitary conditions, overcrowding, and small cells,⁵⁴ a lack or refusal of medical treatment,⁵⁵ severe solitary confinement regimes,⁵⁶ and in the use of handcuffs or other restraints.⁵⁷ As I have argued elsewhere,⁵⁸ there are a variety of moral and policy-based reasons why we allow ill-treatment to happen to individuals in specific circumstances.⁵⁹ The line between what is acceptable and unacceptable not only relies on whether ill-treatment can be considered to fulfil the definition of degradation, but whether ill-treatment is deemed acceptable or not given the circumstances of its use. For example, ill-treatment known to cause significant mental health problems, like solitary confinement, has not been considered to reach the threshold of Article 3 unless there are aggravating factors,⁶⁰ even though it is known to be ‘characterised by severe confusional, paranoid and hallucinatory features, and by intense agitation and random, impulsive, often self-directed violence’.⁶¹

The suffering of individuals is difficult to quantify, and so arguing that a specific case provides an example of the widening of the provision leaves one open to criticism for making arbitrary comparisons which fail to consider the subjective experiences of ill-treatment. Nevertheless, it might *appear* that the scope is widening (this can be viewed in some cases which will be presented below). It is easier to argue that the provision is now being applied to a much wider range of cases than ever before. It is worth highlighting a few more cases where the ambit of Article 3, at least on its surface, appears to have been expanded. In the recent case of *Muršić v Croatia*⁶² the Grand Chamber of the European Court found that there had been a breach of Article 3 amounting to inhuman and degrading treatment when the application was confined in a cell measuring 2.62 square metres for 27 consecutive days. Although the Court in this case did not find that confinement in less than three square metres would always amount to a breach of Article 3 ‘the starting point for the Court’s assessment is a strong presumption of a violation of Article 3.’⁶³ This case *prima facie* appears to strengthen the Court’s view on conditions of detention, proscriptively delimiting the amount of space a prisoner should have. The Court has appeared to expand the remit of Article 3 so that passive smoking in detention could amount to a breach of Article 3. In *Florea v Romania*⁶⁴ it was held that the applicant,

Reply to Steven Greer’ (2017) 17 *Human Rights Law Review* 681; N Mavronicola ‘Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Greer’ (2017) 17 *Human Rights Law Review* 479.

⁵² *Tyrer v UK* (1978) 2 EHRR 1.

⁵³ *Costello-Roberts v UK* (1993) 19 EHRR 112.

⁵⁴ There are a considerable number of cases concerning conditions of detention, but for some examples see: *Khlaifia and others v Italy*, Application no. 16483/12, Judgment of 15 December 2016; *Kalashnikov v Russia* (2002) 36 EHRR 587.

⁵⁵ *Umar Karatepe v Turkey* (2010), Application no 20502/05, Judgment of 12 October 2010.

⁵⁶ *Hellig v Germany* (2011), Application no 20999/05, Judgment of 7 July 2011.

⁵⁷ *Erdogan Yagiz v Turkey* (2007) Application no. 27473/02, Judgment of 3 June 2007.

⁵⁸ N Graffin, ‘Gäffen v Germany: The Use of Threats and the Punishment of Those Who Ill-treat During Police Questioning: A Reply to Steven Greer’.

⁵⁹ *Yazgul Yilmaz v Turkey*, Application no 36369/06, Judgment of 1 February 2011.

⁶⁰ See N Graffin, ‘Gäffen v Germany: The Use of Threats and the Punishment of Those Who Ill-treat During Police Questioning: A Reply to Steven Greer’.

⁶¹ S Grassian, ‘Psychiatric Effects of Solitary Confinement’ (2006) 22 *Washington University Journal of Law and Policy* 325, 328.

⁶² *Muršić v Croatia* (2016) Application no. 7334/13, Judgment of 20 October 2016.

⁶³ *Ibid*, para 126.

⁶⁴ *Florea v Romania*, Application no 37186/03, Judgment of 14 September 2010.

who was suffering from chronic hepatitis and arterial hypertension, was subjected to a breach of Article 3 as a result of being subjected to passive smoking.

6. Human Dignity in Article 3

In the last 20 years the Court has been increasingly willing to utilise the concept of human dignity to expand the remit of cases which fall within the ambit of degradation (and Article 3 in a more general sense).⁶⁵ We can see 'human dignity' used in early cases concerning degradation such as the *East Africans* case⁶⁶ where the Commission considered that the 'general purpose of the provision is to prevent interferences with the dignity of man of a particularly serious nature',⁶⁷ but it seems to be used increasingly by the Court. We can see human dignity used in the case of *Kudła v Poland*⁶⁸ where the Court held:

[T]he State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.⁶⁹

In *Yankov v Bulgaria*⁷⁰ the Court stated that the forced shaving of someone's hair could amount to degrading treatment, whilst drawing on the concept of human dignity:

The Court thus considers that the forced shaving off of detainees' hair is in principle an act which may have the effect of diminishing their human dignity or may arouse in them feelings of inferiority capable of humiliating and debasing them. Whether or not the minimum threshold of severity is reached and, consequently, whether or not the treatment complained of constitutes degrading treatment contrary to Article 3 of the Convention will depend on the particular facts of the case, including the victim's personal circumstances, the context in which the impugned act was carried out and its aim.⁷¹

In the case of *Svinarenko and Slyadnev v Russia*,⁷² where the Grand Chamber of the Court found that the practice of keeping prisoners in metal cages during court hearings amounted to degrading treatment, a violation of human dignity is cited for the finding of a breach. In another case which appears to expand the remit of Article 3 - *Slyusarev v Russia*⁷³ - the applicant alleged that taking his glasses after his arrest, then making the detainee wait five months before returning them to him, and another two months for new glasses, amounted to degrading treatment. The Court considered that if the glasses had been returned to the applicant quickly no issue under Article 3 would have arisen,⁷⁴ but:

[U]nder Article 3 of the Convention the States must ensure that a person is detained in conditions which are compatible with respect for his *human dignity*, and that, given the practical demands of imprisonment, his health and well-

⁶⁵ For further reading: N Mavronicola (2016) 'Bouyid v Belgium: The 'Minimum Level of Severity' and Human Dignity's Role in Article 3 ECHR' (2017) 1 *Cyprus Human Rights Law Review* 2, 198-212.

⁶⁶ *East Africans Case v UK*, Comm Rep, 14 Dec 1973.

⁶⁷ *Ibid*, para 189.

⁶⁸ *Kudła v Poland* (2000) 35 EHRR 198.

⁶⁹ *Ibid*, para 94.

⁷⁰ *Yankov v Bulgaria* (2003) 40 EHRR 854.

⁷¹ *Ibid*, para 114.

⁷² *Svinarenko and Slyadnev v Russia* (Applications nos 32541/08 and 43441/08), Judgment of 17 July 2014 [Grand Chamber].

⁷³ *Slyusarev v Russia* (2010), Application no. 60333/00, Judgment of 20 April 2010.

⁷⁴ *Ibid*, para 42.

being are adequately secured by, among other things, providing him with the requisite medical assistance. Taking the applicant's glasses could not be explained in terms of the "practical demands of imprisonment", and, even more so, was unlawful in domestic terms....⁷⁵

In *Bouyid v Belgium*⁷⁶ the Grand Chamber of the European Court was called to consider whether single slaps inflicted on a minor and an adult in police custody amounted to a breach of Article 3. The Grand Chamber, overruling the Chamber judgment in this case, ruled by 14 votes to 3 that there had been a substantive violation of Article 3. The Grand Chamber unanimously found that there had also been a breach of the investigative duty under Article 3. The case of *Bouyid* was particularly interesting for the Court, as much of the disagreement within the Grand Chamber lay in the understanding of the 'minimum level of severity' required for ill-treatment to be considered to fall within the threshold of Article 3. The Chamber in this case had considered that:

Even supposing that the slapping took place, in both cases it was an isolated slap inflicted thoughtlessly by a police officer who was exasperated by the applicants' disrespectful or provocative conduct, without seeking to make them confess. Moreover, there was apparently an atmosphere of tension between the members of the applicants' family and police officers in their neighbourhood. In those circumstances, even though one of the applicants was only 17 at the time and whilst it is comprehensible that, if the events really took place as the applicants described, they must have felt deep resentment, the Court cannot ignore the fact that these were one-off occurrences in a situation of nervous tension and without any serious or long-term effect. It takes the view that acts of this type, though unacceptable, cannot be regarded as generating a sufficient degree of humiliation or debasement for a breach of Article 3 of the Convention to be established. In other words, in any event, the above-mentioned threshold of severity has not been reached in the present case, such that no question of a violation of that provision, under either its substantive or its procedural head, arises.⁷⁷

The Grand Chamber overturned this decision, placing emphasis on the concept of human dignity and finding that there was a breach of Article 3 amounting to degrading treatment. It suggested, again, that 'respect for human dignity forms part of the very essence of the Convention'.⁷⁸ Whereas some lawyers caution against the use of dignity in underpinning human rights judgments because of its intangibility,⁷⁹ Webster places human dignity as a key component in our understanding of degradation and argues that 'respect for human dignity is a fundamental value that guides interpretation at different levels of abstraction'.⁸⁰ The term is useful due to its aspirational nature. It can provide a benchmark, however intangible that might be, for the betterment of the protection of humans by other humans, because people intuitively render a meaning to it. In addition, as will be argued below, all language has its limitations and if we are to pick apart 'dignity' as a concept, we can pick apart the inadequacies of all human rights language.

7. The Limitations of Language in Encapsulating Article 3

For this section, this chapter will focus on the concepts of degradation (and by inference dignity) for the purposes of illustration. Webster outlines various 'benchmarks' which derive from the definitions provided by the European Court as encompassing what degradation means: 'feelings of fear, anguish, inferiority capable of causing humiliation or debasement; the

⁷⁵ *Ibid*, para 43 [emphasis added].

⁷⁶ *Bouyid v Belgium*, Application no 23380/09, Judgment of 28 September 2015.

⁷⁷ *Bouyid v Belgium* (Application no 23380/09), Judgment of 21 November 2013 [Fifth Section].

⁷⁸ *Bouyid*, para 89.

⁷⁹ See, for example: R. O'Connell 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6(2) *International Journal of Constitutional Law* 267, 267-286.

⁸⁰ E. Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law* (Routledge 2018) 48.

breaking of one's will or conscience; and suffering, contempt or lack of respect for one's personality'.⁸¹ These are found in the many definitions of degradation the Court uses; we might add human dignity to the list. Webster argues that degradation is a sort of 'outline' into which the benchmarks fit.⁸² Elsewhere, Webster points out the epistemological dimension of the provision, outlining that the 'every day uses of terms may accord within one each other, or they may diverge. Interpretation involves deciding which of the semantic meanings constitute the proper legal meaning'.⁸³ However, finding proper legal meaning may be an impossible task. This could be why the Court has employed so many benchmarks – to cast the net wide and capture within the many definitions, different harms, effects and wrongs which we want Article 3 to prohibit. Often these benchmarks are unable to get to the crux of why a form of ill-treatment is acceptable or not, because they cannot define ill-treatment while at the same time set parameters for the provision. For example, in relation to the benchmark of humiliation, it could be argued that not all grossly humiliating treatment will be something that leads to an Article 3 breach⁸⁴ – the imposition of a standard prison sentence could be grossly humiliating for many but, of course, this does not mean it is a human rights violation. We can see other examples of this, where the Court uses definitions which although might be evident in the form of ill-treatment present, could be apparent in a seemingly acceptable form of treatment.

A textual analysis to deciphering what amounts to a breach of Article 3, and what does not, will never be enough – language always has limitations in its signifying processes. The benchmarks used by the Court will never fully cover what the Article seeks to protect, whilst delimiting the provision at the same time. The Court needs to be cognisant (as I believe it generally is) of wider moral and policy arguments when considering what breaches the provision, and even justifications for some forms of harms (e.g. solitary confinement) being permitted. How we decipher what degradation is can rather be achieved by looking at the cases as they are practised. As argued by Wittgenstein, recognising the limitations of language, 'for a large class of cases of the employment of the word 'meaning'—though not for all—this word can be explained in this way: the meaning of a word is its use in the language',⁸⁵ or in other words, the meaning of the word is in its use.

Language is, of course, still of upmost value. It provides signals to effects, harms or emotions, for example, which as humans we understand as embodying specific qualities, however differently these might be felt. Some words may also be more intangible than others. 'Dignity', for example, is a more ethereal concept than 'humiliation', an emotion we might experience many times within our lifetime and can identify more readily through its mental and physical effects. Nevertheless, this is not to say 'dignity' is a useless concept for the court to hinge its decisions upon, because it accords a status to individuals, creating an inviolable bubble around them against infringement from certain harms. It has meaning, however intangible that might be, but more importantly *use*.

7. Limits, Evolutions, and Potentialities of Article 3 with Respect to Migrants

Article 3, as demonstrated so far in this article, has been used in a wide-ranging array of cases. In relation to migration, Article 3 has been deployed in numerous ways to prevent harm to individuals. For example, it has been used to prevent extradition of migrants where they might be subjected to a breach of Article 3 on being returned to their home country. In the leading case of *Soering v UK*⁸⁶, which dates to 1989, the applicant was a German national who had

⁸¹ *Ibid*, 63.

⁸² *Ibid*.

⁸³ *Ibid*, 48.

⁸⁴ J. Vorhaus 'On Degradation-Part One: Article 3 of the European Convention on Human Rights' (2002) 31 *Comm. L. World Rev* 374.

⁸⁵ L. Wittgenstein, *Philosophical Investigations (PI)*, (P.M.S. Hacker and Joachim Schulte eds. and trs. 4th edn, Wiley-Blackwell 2009) 43.

⁸⁶ *Soering v United Kingdom* (1989) 11 EHRR 439 PC.

moved to the United States. It was alleged that the applicant and his girlfriend had co-conspired to murder his girlfriend's parents. The two then fled to Europe, where they were arrested in England. The United States requested extradition of the pair, but the applicant argued there was a risk of the death penalty being imposed which could breach Article 3. The Court considered that it was not the risk of the death penalty which breached Article 3, but 'death row phenomenon', referring to the emotional distress facing prisoners on death row. Consideration was given to the applicant's young age and the mental state he was in at the time of the offence. This was the first time an individual was refused extradition based on the potential for a breach of Article 3.

In *M.S.S. v Belgium and Greece*,⁸⁷ Belgium was found to be in breach of Article 3 when, under the EU Dublin Regulation, it removed an asylum claimant to Greece where there was a real risk that the living conditions the person would be made to live under would breach Article 3. This case highlighted that the Court would be willing to refuse extradition to a country which was a member of the Council of Europe, and signatory to the ECHR. In the case of *Hirsi Jamaa and others v Italy*⁸⁸ the applicants challenged Italy's push-back policy of intercepting asylum claimants at sea and returning them to Libya. This was not a new phenomenon, but this case allowed the Court to make a judgment on its compliance with relevant human rights standards. In respect of Article 3, the Court found a breach of Article 3 because the applicants were exposed to the risk of repatriation to Eritrea and Somalia.

The Court has sometimes changed previous decisions to lead to the better protection of individuals. This can be seen in a series of cases involving challenges to extradition based on ill-health. In *D v UK*⁸⁹ the applicant, who had AIDS, was ordered to be returned to St Kitts for committing a criminal offence. The European Court held here that the 'abrupt withdrawal' of the applicant to a state where he would not have access to adequate medical treatment, or family or support networks, could amount to inhuman treatment. The Court held here that 'very exceptional circumstances' compelled them to make this decision. In *N v UK*⁹⁰ it was considered that a Ugandan citizen with HIV/AIDS could be returned to their home country, even though the medication she required to keep her alive beyond one year was expensive in Uganda and was not available in her hometown. However, in the 2016 of *Paposhvili v Belgium*⁹¹ the Grand Chamber reshaped its case law on Article 3. The applicant was seriously ill and expulsion to Georgia would put him at risk of inhuman treatment and an earlier death. The Grand Chamber lowered the threshold of 'very exceptional circumstances', which had appeared to require an imminent risk of dying. The Court noted that the applicant was not in an imminent danger of dying but 'very exceptional circumstances' should include instances where a person 'would face a real risk, on the account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction of life expectancy'.⁹²

Article 3, however, has its limitations in protecting individuals from harm, some of these arising from the Article itself, and others relating to how human rights law operates. There is a carefully crafted body of jurisprudence which delimits the scope of the Article.⁹³ Whereas all conduct falling within its ambit is absolutely prohibited, harmful conduct can take place which is not deemed to reach the threshold of the provision and therefore is permitted under human rights

⁸⁷ *MSS v Belgium and Greece* (2011) 53 EHRR 28.

⁸⁸ *Hirsi Jamaa and others v Italy*, Application no 27765/09, Judgment of 23 February 2012.

⁸⁹ *D v UK* (1997) 24 EHRR 423.

⁹⁰ *N v United Kingdom* (2008) Application no 26565/05, Judgment of 27 May 2008.

⁹¹ *Paposhvili v Belgium* (2016) Application no 41738/10, Judgment of 13 December 2016.

⁹² *Ibid*, para 186.

⁹³ C Harvey 'The International Protection of Refugees and Asylum Seekers: The Role of Article 3 of the European Convention on Human Rights' in A Abass and F Ippolito, *Regional Approaches to the Protection of Asylum Seekers: an International Legal Perspective* (Ashgate 2016).

law. For example, we can see the Court set parameters on the protection of individuals in the case of *Rahimi v Greece*,⁹⁴ where the Court found a violation of Article 3 ECHR regarding the detention of foreign children, but not for adults. The Court pointed out the applicant's 'extreme vulnerability' as an unaccompanied minor, yet the camp was noted to be 'filthy beyond description' and 'a health hazard for staff and detainees alike', due to overcrowding and extremely poor sanitary conditions. In cases where harms have been committed, but do not reach the threshold of Article 3, it is very regrettable that defendant states are, in a sense, exonerated – this is a further drawback to the operation of the Article.

Furthermore, given the scale of human rights issues facing migrants and refugees, we can say with certainty that human rights law has failed them. In a wider sense, migrants face daily human rights issues and abuses in detention, and in the journeys that they make. Given that human rights law is supposed to protect the most vulnerable, this illustrates its clear failure as a body of law. When the Court has got involved, it has fallen short. This was no more evident when the ECtHR were asked to allow migrants who had been travelling from Libya but had been rescued by the search and rescue vessel SeaWatch 3, to disembark in Italy. At that time there were serious concerns for the health of the migrants, some of whom including minors.⁹⁵ In its decision,⁹⁶ the ECtHR did not grant the applicant's requests to be disembarked, but rather asked Italy 'to take all necessary measures, as soon as possible, to provide all the applicants with adequate medical care, food, water and basic supplies as necessary' and to provide legal guardianship for minors. Therefore, while it was clear that the migrants needed to disembark on safe and dry land, that they could not stay at sea continually and Italy was where they were seeking safe refuge, the Court upheld the state's request to prevent disembarkation. Later the captain of SeaWatch 3 was exonerated after she was arrested for disembarking the ship at Lampedusa.⁹⁷

From an operational perspective, Article 3 is also limited in its ability to protect individuals by how it is applied by the Court. Traditionally Article 3 has operated on a largely 'declaratory' basis where breaches of the Article are found, published in the Court's reports, and States are named and shamed into compliance.⁹⁸ Although compensation is awarded under Article 41 of the Convention, monies awarded are designed to cover pecuniary and non-pecuniary damages, therefore the amounts awarded are unlikely to have any deterrent effect on the conduct of States.⁹⁹ The Court can also only operate when cases, or more recently, advisory opinions, are brought to it, although it should be noted that positive obligations arising from some of the Articles provide means through which some issues can be addressed on a less reactive basis. For example, it has been established that there is a duty to investigate under the procedural head of Article 3, which creates positive obligations for the state to create

⁹⁴ *Rahimi v Greece* (2011) Application no 8687/08, Judgment of 5 July 2011.

⁹⁵ Chico Harlan 'Sea-Watch 3: Refugee Ship Defies Italy's Far-right Leader Matteo Salvini by Taking Rescued Migrants to Port' *The Independent* (London, 27 June 2019).

⁹⁶ This is unreported, but the press release can be found here: Registrar of the ECtHR, 'ECHR Grants an Interim Measure in Case Concerning the SeaWatch 3 Vessel' ECHR 043 (2019), (ECtHR 29 January 2019) <<https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-6315038-8248463&filename=ECHR%20grants%20an%20interim%20measure%20in%20case%20concerning%20SeaWatch%203%20vessel.pdf>>.

⁹⁷ Zamira Rahim, 'Italian Court Frees Captain of Sea-Watch Refugee Boat in Blow to Matteo Salvini', *The Independent*, (London, 2 July 2019).

⁹⁸ B Çalı and A Wyss, 'Why do Democracies Comply with Human Rights Judgments?' A Comparative Analysis of the UK, Ireland and Germany' (Part of the United Kingdom Economic and Social Research Council project on the 'Legitimacy and Authority of Supranational Human Rights Courts: A Comparative Analysis of the European Court of Human Rights' Grant No: RES-061-25-0029); T Keenan 'Mobilising Shame' (2004) 103 *South Atlantic Quarterly* 2-3.

⁹⁹ For further discussion, see: N Graffin, 'The Legal Consequences of Ill-treating Detainees Held for Police Questioning in Breach of Article 3 ECHR' (2014) 20 *European Journal of Current Legal Issues* 2.

sanctions and provide mechanisms through which individuals can be prosecuted with the view to the potential for punishment.¹⁰⁰

Human rights law also has the potential, as many critical legal scholars point out, of crowding out other means of addressing harms, whether these might be political methods or otherwise. David Kennedy, for example, argues that human rights law occupies too large a space in advancing freedoms, to the detriment of other emancipatory strategies.¹⁰¹ Sometimes other strategies will be much more effective. The Court is cognisant of its limitations. For example, in the case of *J.R. v Greece*¹⁰² it noted in mitigation to finding no violation to Article 3 (in addition to a lack of evidence that the conditions of detention were poor, as well as the brevity of the detention) the exceptional and sharp increase in migratory flows in Greece which had created organisational, logistical and structural difficulties for the State. Under these conditions, it might be inferred, finding a breach of Article 3 was unlikely to have any effect on the state being able to respond to improving conditions of detention. Therefore, other strategies were required.

One relatively recent, and potentially radical, addition to the armoury of the European Court is the pilot judgment procedure. This procedure was developed as a technique of identifying structural problems underlying repetitive cases against many countries and imposing an obligation on states to address those problems. If the Court receives several applications with the same root cause it can select one of these for a pilot judgment to seek to remedy the underlying issue.¹⁰³ The process has been codified in Rule 61 of the Rules of the Court,¹⁰⁴ and has been used to address issues with conditions of inhuman and degrading conditions of detention in *Ananyev and others v Russia*¹⁰⁵ and *Torreggiani and others v Italy*.¹⁰⁶ Once a pilot judgment decision has been made, where a breach has been found, it is up to the Committee of Ministers to oversee the execution of the judgment – should that mean supervising the amelioration of conditions of detention, for example, or a change in the law. Therefore, the pilot judgment procedure can be used as a means of creating obligations to improve human rights.

In respect to the protection of migrants, a pilot judgment could be made aimed at improving conditions in detention camps, such as Moria, in Lesbos in Greece. However, as outlined previously, the ability of the Court to respond to harms rests on cases being brought before it – in respect of the pilot judgment procedure it rests on many cases being brought by different individuals – and it rests on the willingness and ability of the State in question to comply with the judgment. Therefore, while the procedure has potentialities for the protection of migrants, it carries with it many of the limitations of the Court itself. Nevertheless, there is the potential that the pilot judgment procedure could be utilised to more effective means. This is an area where the Court could attempt to find more radical and innovative ways of protecting people from harm.

9. Conclusion

In the 50 years since the *Greek* case Article 3 of the European Convention of Human Rights has evolved in a variety of ways. Its remit has expanded, and it is now being utilised in an increasingly wide range of cases. It has also set its parameters, giving us some guidance as to the threshold between acceptable and unacceptable conduct and delimiting cases where it

¹⁰⁰ *Assenov v Bulgaria*, (1999) 28 EHRR 651, para 102.

¹⁰¹ D Kennedy 'The International Human Rights Movement: Part of the Problem?' (2002) *Harvard Human Rights Journal* 15, 101–126.

¹⁰² *J.R. and others v Greece* (application no. 22696/16), Judgment of 25 January 2018, para 138.

¹⁰³ Council of Europe, *Factsheet: Pilot Judgments* (Council of Europe 2019).

¹⁰⁴ Council of Europe, *Rules of Court* (Council of Europe 2019), Rule 61.

¹⁰⁵ *Ananyev and others v Russia* (2012) 55 EHRR 18.

¹⁰⁶ *Torreggiani and others v Italy* (2013) ECHR 10.

can be applied. The Court has also provided examples of forms of harmful conduct which might be acceptable under Article 3, for instance, solitary confinement in a regulated environment. The European Court is now able to deploy a potentially radical new power, through the pilot procedure, which can enable the supervision of changes to systemic issues. This could allow the Court to supervise the amelioration of the protection of individuals, such as the improvement of conditions of detention for migrants.

This chapter has provided a snapshot of 50 years of judgments under the provision. It has traced some of its developments and its limitations, including how the concept of 'dignity' is now being used by the Court. It has also discussed the different definitions under the provision, regarding torture, inhumanity and degradation, seeking to argue that debates concerning how harms are defined under the article will always be inadequate. These judgments have undoubtedly led to the improvement of human rights standards. Nevertheless, torture and inhuman and degrading treatment and punishment are still widespread in the Council of Europe, particularly in the Russian Federation and Turkey. Europe faces an uncertain future as the human rights of individuals are under increasing attack – particularly those of migrants fleeing war and persecution. This chapter finishes in the hope that Article 3 can be continued to be deployed in new and more innovative ways to prevent harms committed against the person in the future.

Chapter 5

The Triumph of International Law: The Clash of Ideas That Shapes International Law

Marjan Ajevski

Abstract

International law has never been more relevant. It touches every corner of the globe and it even extends beyond Earth's atmosphere and into space. It regulates relations between states, between states and their populations, between states and international organization, and between any combination of these actors. The international system is a multi-level juggernaut juggling multiple communities, multiple loyalties and multiple legitimacies.

In this Chapter, I will talk about the two broad intellectual ideas that have shaped the international order since World War II. They have also brought it at a tipping point, where these two ideas are trying to force a change that they cannot fully accomplish. The result of this could be a long-term status quo, an impulse for renewed regionalisation of international relations and a decline in transregional relations.

1. Introduction

International law has never been more relevant, but it is also at a tipping point. After the firm conviction that a liberal world order¹ was coming into existence in the 1990s and early 2000s, things stalled by the end of the 2010s. Freedom House, a USA-based NGO, has tracked the state of freedom in the world for the past 40 years. In its 2020 report² it marked the fourteenth year in which more countries declined in their freedom rankings than improved. It is not just the 'usual suspects' of Russia, China or Saudi Arabia contributing to this state of affairs. Countries that were previously thought of as having completed their liberal democratic transformation, like Hungary or Poland, are experimenting with a system of illiberal democracy³ where, while there may be regular and somewhat free elections, the system can certainly not be described in any sense as liberal. They cannot be considered liberal because they have purposefully eroded the foundations of a liberal state, such as certain equality rights, like gender equality, LGBTQ+ rights, or minority rights, as well as the systemic guarantees usually found in liberal democracies, like independent media or courts.

¹ Daniel Deudney and G. John Ikenberry, 'The Nature and Sources of Liberal International Order' (1999) 25 *Review of International Studies* 179; G. John Ikenberry, 'The End of Liberal International Order?' (2018) 94 *International Affairs* 7.

² Freedom House, 'Freedom in the World 2020: A Leaderless Struggle for Democracy', (Freedom House 2020), <https://freedomhouse.org/sites/default/files/2020-02/FIW_2020_REPORT_BOOKLET_Final.pdf> accessed 02 October 2020.

³ Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 *Foreign Affairs* 22.

But this essay is not about the domestic changes⁴ that have happened across the globe, although they are connected. This essay is about the changes that occurred in the international system, to which the rise of populism and illiberal democracies are partially a reaction. It is about three possible scenarios: the first where the international system will revert to a system of great power politics, something akin to the 19 Century post-Congress of Vienna system⁵ with modern style governance attached. The second scenario is a truly liberal international order, where the status of the individual, their liberty, rights and the satisfaction of their needs, will be a guiding principle of a global public order. Finally, there is a third scenario where the current state of 'neither here nor there' may continue for some time, but the structural legitimacy problems in the international system *for liberal democracies* will persist and continue to create problems for the domestic balance of powers set up by liberal constitutions.

So, what are these legitimacy problems? In short, the current system of global governance gives the executive branch of national governments mechanisms to circumvent domestic deliberation and accountability. It alters the balance of liberal constitutional protections in favour of the executive.⁶ For illiberal democracies and outright authoritarian regimes this is not a problem, they are not really concerned with accountability, representation and voice. But for liberal democracies, it is. In order for liberal democratic countries to safeguard their domestic constitutional balance, they will need either to make the international order reflect liberal democratic values, or re-shape it so that they have veto power if not control, over the governance of world affairs. This is not an easy thing to accomplish given the urgent need to tackle existential threats to humanity such as climate change or nuclear proliferation.

Unfortunately, liberal democracies may no longer have the hard or soft power to bring either of those scenarios into being and, consequently, we may be headed for a longer status quo: a situation where things continue as they are, and where neither vision of the international system has enough support to become the new international order. A frozen international law if you will. By this I do not mean that substantive norms will not change, they will, but rather I mean that the norms that create the fundamental shape of the system, the basic rules of the game, will not change simply because no one side has enough power to change them. In this prolonged status quo, things continue to function much as they do now, albeit with less focus on issues such as rights and democracy, and more focus on issues such as security, free trade and possibly climate change. There will be incentives to maintain and deepen regional political and economic organizations. However, there will be a difference of the types of regional arrangements that will be created or strengthened. The European Union/European Community as well as the Council of Europe models will fall out of favour, and the Association of East Asian Nations (ASEAN) centred around China or the new Eurasian Economic Union centred around Russia will be the blueprints of this new regionalism. There will still be ongoing trade relations or security cooperation between the regions – there will not be a return to a Cold War type of scenario. Nevertheless, it will be a far cry from the liberal world order that early liberal scholars advocated for⁷ and what liberal democracies need.

⁴ For more on the current challenges that democratic systems face see: Jamie Bartlett, *The People Vs Tech: How the Internet Is Killing Democracy (and How We Save It)* (Random House 2018); Yascha Mounk, *The People Vs. Democracy: Why Our Freedom Is in Danger and How to Save It* (Harvard University Press 2018); David Runciman, *How Democracy Ends* (Profile books 2018).

⁵ For one account of the Congress of Vienna (Concert of Europe) system see Henry Kissinger, *Diplomacy* (Simon & Schuster 1994) 78 – 103.

⁶ For a good account of how this is the case within the EU, but that also applies to global governance see Andreas Follesdal and Simon Hix, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 *JCMS: Journal of Common Market Studies* 533.

⁷ For an example of this line of thought see Jeffrey L. Dunoff and Joel P. Trachtman, *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009); Jack Goldsmith and Daryl Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122 *Harvard Law*

That said, to get to where we are and chart a course of where we are going, it is useful to know where we started. The current affairs are a result of the push and pull of two strands of thought, classicist ideal and a liberal ideal of international law. Simpson has called these strands the 'two liberalisms', as they are both a version of liberalism, one procedural/formal/neutral, the other one substantive.⁸ Consequently, I will first write about the classic international law master narrative – the short, simple story that we tell ourselves about how the system works. I will then describe how this narrative fails to account for the mounting changes through the words of those who have been alarmed by the changes, lamented its change, or rebelled against the new upstart order in the last 50 years. I will then present the narratives that pushed for creating a substantive liberal world order, intensifying after the end of the Cold War. It is these two forces, the classical and the progressive, that have shaped the current system. In closing, I will give an outline of the possible ways in which the current dilemma can be resolved.

There is one more caveat: in writing about these issues I have had to paint these narratives and events in broad brush strokes. They span decades and some of the things that the voices I present here have said would happen did not happen nor, with hindsight, were likely to happen. What I try to present here are broad examples of schools of thought that have shaped the current system. Consequently, the arguments presented lose their nuance, or they seem obvious. But they are, the justifications, fears or arguments of their generation, at times repeating the arguments from a different generation, trying to make them succeed when the conditions for that success have long passed or were yet to emerge.

2. The Master-narrative of the international system

So, what is a master-narrative? It is a short simple story about how the system works. All legal systems have a master-narrative and it produces the self-conception of what the actors do in the system – what their role and purpose is. It is a story about the system itself; 'a governing underlying narrative that each legal system tells itself – more and less openly – about why it is constructed the way it is, why it operates as it does, and why this makes good sense.'⁹ It paints the system in broad and simple brush strokes (the UK's parliamentary sovereignty; the USA's balance of power with checks and balances; Germany's cooperative federalism) and mostly it is unaware of the paradoxes contained within it – or chooses to ignore them. After all, human beings can live with quite a lot of cognitive dissonance.¹⁰

Klabbers calls this master-narrative the theory under which international lawyers operate, regardless of whether they see the international system as 'a tool for states[persons]', as the 'handmaiden of global capitalism', or a 'hope for the poor and oppressed'.¹¹ It is a set of 'ideas

Review 1791; Stéphanie Henneville-Vauchez, 'Constitutional V International? When Unified Reformatory Rationales Mismatch the Plural Paths of Legitimacy of ECHR Law' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011); Jan Klabbers, 'Constitutionalism Lite' (2004) 1 *International Organizations Law Review* 31; Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009); Martti Koskeniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes About International Law and Globalization' (2006) 8 *Theoretical Inquiries in Law* 9; Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World?: Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009); Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000).

⁸ Gerry Simpson, 'Two Liberalism' (2001) 12 *EJIL* 537.

⁹ Mitchel de S. O. L'E Lasser, 'Judicial (Self-)Portraits: Judicial Discourse in the French Legal System' (1995) 104 *The Yale Law Journal* 1325; Mitchel de S. O. L'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2009); Mitchel de S. O. L'E Lasser, 'Transforming Deliberations' in Nick Huls, Maurice Adams and Jacco Bomhoff (eds), *The Legitimacy of Highest Court's Rulings: Judicial Deliberations and Beyond* (Cambridge University Press 2009) 37.

¹⁰ Chapter nine, Arrow of History, in Y.N. Harari, *Sapiens: A Brief History of Humankind* (HarperCollins 2015).

¹¹ Jan Klabbers, *International Law* (Second edn, Cambridge University Press 2017), 4.

and assumptions about what the function of international law is.¹² When it comes to the international system, the key assumption is the centrality of states. International law is generally thought of as a bundle of norms governing international relations – and not all international relations, but the relations between states. The buying and selling of goods by private entities that cross borders is an example of international relations, but it is not governed by *public* international law, because it does not have a public component.

Probably the most obvious place where we can find the master-narrative of international law is in the story of its sources, where the assumption about the centrality of states is key to their structure and validity. The international system is seen as a system of anarchy, as opposed to hierarchy – there is no central legislator and no central authority that can perform the law-making and law application functions typically found in national legal systems. Consequently, all sources of international law must be traced back to the consent of the states. Therefore treaties, custom, and general principles of law are sources of law; judicial decisions and the writings of scholars, on the other hand, are subsidiary means for determining the rules of law.¹³ The feature that divides them is that the former are created by states, while the latter are reports of the existence of law already created by states. An international court cannot be a source of law – cannot create law, merely discover it in the actions of states.

International courts and commentators go out of their way to show that an international norm is a product of state consent. The traditional account says that international treaties are negotiated and drafted by state representatives, and states are the only legal actors that can be parties to them, whether by signature or ratification.¹⁴ International treaties are where state consent is most clearly visible, as the process to their conclusion is a lengthy one and the final instruments of consent quite formalised. The situation is similar with international custom, which represents consistent general practice (of states) coupled with *opinio juris*, the belief (of states) that the practice is accepted or required as a matter of law.¹⁵ Since the creation of custom is a gradual process, international law has built in a safety valve, the persistent objector rule, whereby a state that observes the creation of a custom can object to the custom's application to itself and can thus 'block the formation of rights [and obligations] vis-à-vis others'.¹⁶

Consequently, international law has created a convenient rule of thumb regarding the freedom of states to act, first underlined in the PCIJ's *Lotus* case,¹⁷ a dispute about whether Turkey could extend its jurisdiction to cover crimes committed against its nationals abroad. The PCIJ, by the deciding vote of the president of the court, said that international law

leaves them ... a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.¹⁸

In essence, the *Lotus* principle is a handy heuristic device: states are free to act unless there is a prohibitive rule preventing states from taking that action or a mandatory rule that they must follow requiring a specific action in a specific situation. In the case of the *SS Lotus*, Turkey was entitled to prescribe extra-territorial criminal jurisdiction in its criminal code; however, it

¹² *ibid.*

¹³ Article 38 of the Statute of the International Court of Justice.

¹⁴ Articles 11 – 15 of the Vienna Convention on the Law of Treaties.

¹⁵ Klabbers, *International Law*, 31 – 34; but also see Malcolm N. Shaw, *International Law* (Cambridge University Press 2008).

¹⁶ Klabbers, *International Law*, 34. But also see the, *Fisheries (United Kingdom v. Norway)*, Judgment of December 18th, 1951: ICJ Reports 1951 116, 139.

¹⁷ PCIJ, *The Case of the 'SS Lotus'*, Series A, No. 10, September 7th, 1927.

¹⁸ *ibid.*, 19.

was prohibited from exercising its jurisdiction on another state's territory without that state's permission.¹⁹

3. The Fear of a Changing World

3.1 Lamenting Change in International Law

International lawyers are, or were, by nature a bit traditionalist. It should not come as a surprise for a profession that collates decades, sometimes centuries of examples of state practice in order to determine what the law is. This is to say not that international lawyers were not at the forefront of radical change in thinking about the nature of the international system, either in the past²⁰ or in the present,²¹ but that our praxis has not changed much when wearing the international lawyer's hat.²²

Nevertheless, change we do, and much of the argument in this Chapter is about the current situation that is the result of the struggle between the two main thoughts in international law. The first line of thought sees international law as law created by states and for the purpose of regulating their relations, while the second sees it as an extension of liberal law and politics, constraining power while allowing the individual to live free. This section will outline some of the arguments for the first view by presenting the protagonists' fear of the second.

3.2 The Fear from the Bench

The *Lotus* principle might be the high-water mark of the classical account of international law, and the last 50 years have seen changes that have upended this classical account of the centrality of states. An early indication of the change that was to come to international law, as well as the reasons why it needed to change, was the ICJ's 1951 Advisory Opinion on reservations to the Genocide Convention.²³ The Genocide Convention was the brainchild of Raphael Lemkin, who started advocating for the criminalisation of the destruction of an entire group while WWII was still raging.²⁴ With the conclusion of the drafting of the Genocide Convention and the final vote in the UN General Assembly, his vision was at the cusp of being realised, when several states attached reservations during its signing and ratification, to which other states objected. The UN General Assembly asked the ICJ a number of questions on the consequence of the reservations and objections to the Genocide Convention's membership. The case was argued at the time when the UN was coming into its own, getting increasingly involved into issues of peace and security, having established its functional subjectivity with the ICJ's *Reparations for Injuries*²⁵ advisory opinion. It was also a time when what came to be known as the Iron Curtain²⁶ was beginning to take shape across Europe. There was a sense of great hope for a peaceful future, as well as gathering clouds imperilling that future.

¹⁹ *ibid*, the *Lotus* type reasoning has found its way in several major international judgments, most notably the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1.C.J. Reports 1996, 226; and the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403.

²⁰ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1879-1960* (Cambridge University Press 2002).

²¹ See the citations in *supra* footnote 7.

²² Martti Koskenniemi, 'Letter to the Editors of the Symposium' (1999) 93 *The American Journal of International Law* 351.

²³ *Reservations to the Convention on Genocide*, Advisory Opinion, ICJ. Reports 1951, 15.

²⁴ Philippe Sands, *East West Street: On the Origins of "Genocide" and "Crimes against Humanity"* (Vintage 2017).

²⁵ ICJ, *Reparation for injury suffered in the service of the United Nations*, Advisory Opinion: I.C.J. Reports 1949, 174.

²⁶ Winston Churchill made a reference to an Iron Curtain descending between what later became the Warsaw Pact and Western Europe in his speech at Westminster College in Fulton, Missouri in 1946.

Given this context the majority tried to take the middle line. The ICJ said that the nature of the convention in question, as well as the goal of 'extensive participation of conventions of this type has given rise to a greater flexibility'²⁷ in treaty making. The universal principle that the Genocide Convention protected, the fact that the 'Convention was manifestly adopted for purely humanitarian and civilizing purpose', that the 'contracting States do not have any interests of their own'²⁸ led the ICJ to conclude that '[i]t is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation'²⁹ should result with the diminished membership of the Convention. It also concluded that the states did not intend 'to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible.'³⁰ Consequently, '[t]he object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them.'³¹

The dissenting judges did not agree with the ICJ's assessment, either on the ambiguity or the trajectory of recent treaty making rules and practice, or on the reason for changing them. They restated the law then in place, namely that '[t]he consent of the parties is the basis of treaty obligations.'³² This applies regardless of the nature of the convention or the number of its participants. Should a state make a reservation, that state is not considered to be a party to the convention until all of the other parties at the time agree to that reservation. Otherwise, the treaty loses its integrity and devolves into a bundle of bilateral relations depending on which states accept which reservations. Should states wish to make a more flexible arrangement regarding the reservations regime, they can specify it in the convention itself during the negotiating period.³³

The way that the dissenting judges argued for their conclusion is very telling - they relied heavily on international law's basic assumptions and put the consent of states centre-stage. For example, they looked at past treaty-making practice, giving example after example³⁴ of the centrality of state consent to treaty obligations and to the integrity of the treaty, especially in the practice of the League of Nations. Furthermore, they consistently referred to the intentions of the parties, refusing to entertain that as a World Court they might have a different role than as vehicles for the parties intentions, refusing to entertain arguments regarding the speciality of the Genocide Convention or the specific moment in time of post WWII world reconstruction.³⁵

On the law and practice of treaty-making they were right. Moreover, they were right on the consequences of the opinion when they said that they have a

difficulty in finding a criterion which will establish the uniqueness of this Convention and will differentiate it from the other humanitarian conventions which have been, or will be, negotiated under the auspices of the United Nations.³⁶

Yet, the Genocide Convention's treaty making process became the norm for the way that most of the important multilateral conventions were drafted in the last 50 years.³⁷ While being right on the law, the dissenting judges were wrong regarding their timing because they could not

²⁷ *ibid* 21.

²⁸ *ibid* 23.

²⁹ *ibid* 24.

³⁰ *ibid*.

³¹ *ibid*.

³² *Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo, Reservations to the Convention on Genocide*, Advisory Opinion, I.C.J. Reports 1951, 15, 31 – 32.

³³ *ibid* 37.

³⁴ *ibid*, 32 – 42.

³⁵ *ibid*, 46 – 47.

³⁶ *ibid*, 47.

³⁷ José E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2005).

see an international order beyond an international regime which had states as its central actors.

In 1975 another quiet revolution was taking place at the European Court of Human Rights (ECtHR). For Europe, 1975 saw the finalisation of a two-year process of negotiation between the Warsaw Pact and NATO members regarding peace, security, and cooperation in Europe. This resulted in the signing of the Helsinki Final Act 1975, a mostly political document which proved to be 'a turning point in the Cold War'.³⁸ Crucially, it confirmed the obligation of states to respect human rights as inherent of a person's human dignity and especially 'the right [...] to know and act upon [ones] rights and duties'.³⁹ This provision was used by dissident movements in the Warsaw Pact countries to resist communist oppression, such as the network of national Helsinki Committees and the Solidarity movement in Poland. The 1970s was also the period when the enthusiasm for rights litigation and rights discourse was maturing and where the examples of the Warren Court's bold decisions were becoming more accepted in the public's mind.

This is the background against which the case of *Golder v UK*⁴⁰ was argued. The ECtHR was asked to decide, among other things, whether Article 6 protected the right of access to courts. The problem for the ECtHR was that even though the European Convention on Human Rights (ECHR) had several provisions dealing with what happened once one managed to get to a court,⁴¹ the right to go to court was never specified by a single provision. Consequently, the ECtHR had to improvise and said that

It would be inconceivable ... that Article 6 para. 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.⁴²

While it might have been inconceivable to the majority, the dissenting minority certainly could conceive of such a thing, and this is largely due to the way that they saw their place and function in the international system. Judge Fitzmaurice was the most open in the explanation of his motives. He said that

There is a considerable difference between the case of 'law-giver's law' edicted in the exercise of sovereign power, and law based on convention, itself the outcome of a process of agreement, and limited to what has been agreed, or can properly be assumed to have been agreed.⁴³

For him, in the latter instances a greater 'interpretational restraint' was required where a 'convention should not be construed as providing for more than it contains'.⁴⁴ Consequently, the only inferences that could be made as to rights or norms outside of what was expressly provided in the convention were inferences that were necessary for the operation of those rights or norms. Therefore, 'the necessary, and the only necessary inferential element lies in the assumption [...] that legal proceedings of some kind have been started and are in

³⁸ Philippe Perchoc 'The Organization for Security and Co-operation in Europe (OSCE)' The European Parliament, PE 628.219 – September 2018, 2.

³⁹ Article 7 of the Helsinki Final Act 1975.

⁴⁰ ECtHR, *Case of Golder v UK*, (Application no. 4451/70), 21 February 1975.

⁴¹ This includes what the characteristics of a court are (ie independent, impartial and established by law), Article 6(1) and 6(2) of the European Convention for Human Rights.

⁴² *Golder v UK*, para 35.

⁴³ *Separate Opinion of Judge Sir Gerald Fitzmaurice, Golder v UK*, (Application no. 4451/70), 21 February 1975, para 32.

⁴⁴ *ibid*.

progress,⁴⁵ and not that there is a wholesale guarantee of the right to access to court. Moreover, when speaking for the proper function of the ECtHR in the Convention system he said that

it is for the States upon whose consent the Convention rests, and from which consent alone it derives its obligatory force, to close the gap or put the defect right by an amendment, - not for a judicial tribunal to substitute itself for the convention-makers, to do their work for them ... [otherwise] freedom of action will have been impaired.⁴⁶

It is not that Judge Fitzmaurice was a pejorative legal formalist strictly wanting to adhere to the letter of the Convention – if anything, his reasoning was motivated by a sense of protecting the continued existence of the ECtHR when it was just starting to gain acceptance. At the time, most member states had a time-limited declaration accepting the individual complaints mechanism, which was usually renewed every three years. Fitzmaurice made his concerns plain in his dissent, saying that it was necessary ‘to bear in mind not only that [Article 6] is a provision embodied in an instrument depending for its force upon the agreement - and indeed the continuing support - of governments’.⁴⁷ In addition, it was also ‘an instrument of a very special kind’⁴⁸ – a human rights convention that only had the American Convention on Human Rights, as a companion. Moreover, Fitzmaurice argued that human rights conventions ‘have broken entirely new ground internationally, making heavy inroads on some of the most cherished preserves of governments in the sphere of their domestic jurisdiction or *domaine réservé*’.⁴⁹ What Fitzmaurice was talking about was the possibility to lodge individual complaints and ‘(in effect) sue [one’s] own governments before an international commission or tribunal, - something that, even as recently as thirty years ago, would have been regarded as internationally inconceivable’.⁵⁰ Judge Fitzmaurice was writing in 1975, referring to the period of shortly after WWII, regarding something that is so ubiquitous in liberal democracies today that we do not pay too much attention to its existence.

Consequently, these and similar considerations ‘could justify even a somewhat restrictive interpretation of the Convention’, but nevertheless, they ‘positively do demand, a cautious and conservative interpretation’⁵¹ of the ECHR. For Fitzmaurice, this is especially true of unclear or uncertain provisions ‘where extensive constructions might have the effect of imposing upon the contracting States obligations they had not really meant to assume, or would not have understood themselves to be assuming’.⁵² Therefore ‘[a]ny serious doubt must ... be resolved in favour of, rather than against, the government concerned’.⁵³

Judge Fitzmaurice’s fears that expansive interpretation would alienate states did not come to pass. States continued to engage with the ECtHR and to renew their declarations accepting individual petition before the court. Should the majority have heeded his advice, the international system would have looked quite different than it does today. Unlike the dissenting judges in the ICJ’s advisory opinion on the Genocide Convention, the dissenting judges in the *Golder* case were aware of, even astonished at, the changing nature of international law. Verdross for example, another dissenting judge in *Golder*, was an early champion of the notion of peremptory norms in international law and the idea of an international community, and in his writings on *ius cogens*, included basic human rights as one them.⁵⁴ It was not that the

⁴⁵ *ibid* para 34.

⁴⁶ *ibid* para 37.

⁴⁷ *ibid*.

⁴⁸ *ibid* para 38.

⁴⁹ *Ibid*.

⁵⁰ *ibid*.

⁵¹ *ibid* para 39.

⁵² *ibid*.

⁵³ *ibid*.

⁵⁴ Bruno Simma, ‘The Contribution of Alfred Verdross to the Theory of International Law’ (1995) 6 *EJIL* 33.

dissenting judges were sceptical of the need for states to observe and protect human rights, it is more that they were, in some way, classicist in their view of the fundamental assumptions of international law, and they saw the change happening before their eyes as too rapid. It is for this reason that they did

not consider it permissible to extend, by means of an interpretation depending on clues, the framework of the clearly stated rights and freedoms. Considerations of legal certainty too make this conclusion mandatory: the States which have submitted to supervision by the Commission and Court in respect of 'certain' rights and freedoms 'defined' (définis) in the Convention ought to be sure that those bounds will be strictly observed.⁵⁵

Ultimately, their decision meant that it was states, their intentions and rights that were at stake here, and states are thought to be jealous in guarding their prerogatives. If individuals were to participate in this space, they need to be patient and wait a bit longer, at least that's what they thought.

3.3 The Fear of Change in the Eyes of Scholars

Judges were not the only ones who recognised and protested at the changing nature of international law. Scholars also bemoaned the messiness that the new approaches to international law brought to the issues of the validity of norms – the boundary between law and non-law. Prosper Weil's seminal argument warning about the growing 'relative normativity in international law'⁵⁶ exemplifies this lament.

Weil, writing at the beginning of the 1980's, and mindful of the sharp ideological divides that exist between the capitalist West and the communist East, starts his argument by giving an account of the nature of international law. In this account he described international law as 'an aggregate of legal norms that dictate what its subjects must do (prescriptive norms), must not do (prohibitive norms), or may do (permissive norms)',⁵⁷ and its functions – 'governing international relations'.⁵⁸ The nature and functions of international law are 'interdependent' – the 'emergence of international law as a "normative order" is said to be due to the need to fulfil certain functions' and it will not be able to fulfil these functions unless 'it constitutes a normative order of good quality'.⁵⁹ That is the crux of the matter for Weil since 'without norms of good quality international law would become a defective tool'.⁶⁰ His prime targets in the paper are soft law and *jus cogens*, which through their operation blur the normative threshold⁶¹ between law and non-law.

He explains that soft law can take the form of reports, resolutions or other similar documents created by international organizations. Some soft laws are a product of inputs by states via voting mechanisms by state representatives, resolutions, and this sociologically can be 'an expression of trends, intentions, wishes, [and] may well constitute an important *stage* in the process of elaborating international norms; ... However, such mechanisms do not constitute the formal source of new norms'.⁶² Just because certain prescriptions are repeated in multiple resolutions, they cannot become hard law any more than 'thrice nothing [can] make

⁵⁵ ECtHR, *Separate Opinion of Judge Verdross, Golder v UK*, (Application no. 4451/70), 21 February 1975, para 4.

⁵⁶ Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *The American Journal of International Law* 413.

⁵⁷ *ibid* 413.

⁵⁸ *ibid*.

⁵⁹ *ibid*.

⁶⁰ *ibid*.

⁶¹ *ibid* 415.

⁶² *ibid* 417, emphasis in the original.

something.⁶³ This matters because it undermines what international law is for which is: 'to ensure the coexistence – in peace, if possible; in war, if necessary – and the cooperation of different entities in a pluralistic society which live in a system of anarchy.'⁶⁴ International law, according to Weil, has two functions in this system: to 'reduce anarchy through the elaboration of norms of conduct enabling orderly relations to be established among sovereign and equal states', and, in tension to the first, 'to serve the common aims of the members of the international community.'⁶⁵

Moreover, for Weil, the necessity for international law to fulfil these functions did not change or diminish after WWII and 'there could be no grater error than to contrast 'modern' [...] with 'classic' international law.'⁶⁶ In that sense, international law's functions continue to be as they ever were, 'an instrument for the regulation of pluralistic, heterogeneous society.'⁶⁷ Consequently, if international law was to maintain its double function it would have to remain neutral and positivistic. Neutral because it needed to be impartial in a pluralistic international order. Consequently, it was 'necessary for that system [of norms] to be perceived as a self-contained, self-sufficient world'⁶⁸, separate from a specific system of normativity, such as religious morality, or a specific ideology (at the time when Weil was writing the dominant ideologies were communism and capitalism). And it needed to be positivistic because it required to maintain the distinction between *lex lata* (the law as it exists) and *lex ferenda* (future law/law that should be) if it wanted to remain a 'neutral coordinator between equal, but disparate, entities'⁶⁹. And for Weil, positivistic meant keeping the centrality of voluntarism, of basing international norms on the consent of the states. Especially

[a]t a time when international society needs more than ever a normative order capable of ensuring the peaceful coexistence, and cooperation in diversity, of equal and equally sovereign entities, the waning of voluntarism in favour of the ascendancy of some, neutrality in favour of ideology, positivity in favour of ill-defined values might well destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose.⁷⁰

Weil was writing in July 1983, adapting a previous version written in the French language in 1982. When Weil was writing, the USSR had invaded Afghanistan three years prior, and the United States was starting to increase its assistance to the Mujahedeen fighting them. In March of that same year US President Ronald Reagan announced the Star Wars program, a proposed missile defence system that would, if successful, jeopardise the perceived stability of the Mutual Assured Destruction (MAD) doctrine for a nuclear war. It was a time of heightened tensions between the two dominant nuclear-armed blocs, NATO and the Warsaw Pact, 'a time when international society [needed] more than ever a normative order capable of ensuring the peaceful coexistence, and cooperation in diversity, of equal and equally sovereign entities'.⁷¹ He saw the rise of instruments that had no tangible norms to them but were strewn with aspirational political language that did not allow for easy, or even difficult, understanding of what norms they were trying to create or specify. This language of politics, of aspiration, found in documents that did not embody norms, but were somehow legal at the same time, was not the language of law as he knew it and if it took over it would jeopardise international law's purpose – to maintain coexistence in a plural society. He was fearful that 'the waning of voluntarism in favour of the ascendancy of some, neutrality in favour of ideology,

⁶³ *ibid.*

⁶⁴ *ibid* 418.

⁶⁵ *ibid* 419.

⁶⁶ *ibid.*

⁶⁷ *ibid* 419 – 420.

⁶⁸ *ibid* 421.

⁶⁹ *ibid.*

⁷⁰ *ibid* 423.

⁷¹ *ibid* 423.

positivity in favour of ill-defined values might well destabilize the whole international normative system'.⁷² It is just that this plural society was a society of states, and he could not distance himself far enough to see beyond the intellectual trope of statehood, the inside/outside divide, rather than, for example, imagine a more cosmopolitan system where statehood is but one factor in global relations and just one criteria in participating in rule-making.

3.4 The Fear by National Governments

The wish for a return to days gone by of classical thinking about the international system did not end in the 1980s nor with the coming of the new millennium. On March 13, 2012 an unusual event occurred. The President of the ECtHR, Sir Nicholas Bratza, gave evidence before the UK Parliament's Joint Committee on Human Rights on the topic of human rights judgments.⁷³ Between the time that Weil published his fears and when this session of the Joint Committee convened, both Weil's fears of blurring the normative threshold and Judge Fitzmaurice's apprehension of the expansion of power and reach of the ECtHR were realised. Judges made law and resolutions and other soft law became instrumental in creating international norms and institutions. The UN Security Council created no less than three international criminal tribunals which accelerated the creation of international criminal norms and more than twenty international tribunals were in operation, their dockets and influence increasing daily.⁷⁴ Sir Nicholas was asked to give testimony regarding the controversy over the UK's commitment to upholding ECtHR judgments following the prisoners' voting rights cases⁷⁵ and in the preparation of the coming Brighton declaration on the future role of the court.

The committee began with a soft question: whether Sir Nicholas, as the President of the ECtHR, saw much benefit to be gained by the continuation of dialogue between the court and the different parliaments of the member states of the ECHR. Sir Nicholas, whilst being supportive of dialogue between the court and national parliaments, admitted that 'when one speaks of dialogue, one more naturally refers to exchanges of views and ideas between the Strasbourg Court and judges of the national courts.'⁷⁶ With his opening answers Sir Nicholas established one of his prime defences against most of the objections that the ECtHR's detractors in the UK Parliament would pose – we are no different in the way that we use law, the way that we interpret, and the way that we reason from any other national high court. The reason for this was that 'national judges are natural partners in the sense that their role is [...] essentially the same as ours—namely to interpret and apply the Convention rights.'⁷⁷

For the detractors, this was the main issue since for them the ECtHR is quite different from a national high court – it is an international court. Echoing the concerns of Judges Fitzmaurice and Verdross, Dominic Raab (currently the Foreign Secretary) asked: since 'Article 32 of the Convention mandates the Court to "interpret" and "apply" rights set out in the Convention [w]hich article mandates the Court to update those rights to reflect its view of societal changes?'⁷⁸ Follow-up questions did not go any better, after Sir Nicholas' explanation on the similarity between national courts and the ECtHR. Mr Raab again asked that if Sir Nicholas 'accept[s] there is a creative function [of the ECtHR then] can I put it to you that there is a

⁷² *ibid.*

⁷³ House of Commons, House of Lords, Joint Committee on Human Rights, *Human Rights Judgments*, 13 March 2012, Sir Nicolas Bratza and Erik Fribergh.

⁷⁴ Cesare PR Romano, Karen J Alter, and Yuval Shany (eds) *The Oxford Handbook of International Adjudication*, (Oxford University Press, 2015), 4 – 26.

⁷⁵ While there have been a number of cases against the UK regarding prisoners' voting rights, *Hirst v. the United Kingdom (No. 2)* (Application no. 74025/01), Grand Chamber Judgment, 06 October 2005 and *Greens and M.T. v. the UK* (application nos. 60041/08 & 60054/08), 11 April 2011 are the judgments that started a chain reaction of litigation against the UK in front of the ECtHR.

⁷⁶ House of Commons, House of Lords, Joint Committee on Human Rights, *Human Rights Judgments*, 13 March 2012, Sir Nicolas Bratza and Erik Fribergh, HC 873-iii, Q137.

⁷⁷ *ibid.*

⁷⁸ Q139.

fundamental difference with the common law?’⁷⁹ In another question Mr Virendra Sharma (MP) asked ‘[d]o you accept that there are serious questions about the separation of powers and democratic accountability raised by the doctrine of the living instrument?’⁸⁰

To all and more of these questions, Sir Nicholas’s answers were similar: ‘just like the development of the common law, our development has equally been incremental’;⁸¹ the living instrument doctrine ‘means simply that when interpreting Convention rights you accept that those rights evolve with a change in time and with a change in social conditions’;⁸² or that ‘[i]t does not seem to me that the interpretive exercise that we carry out is different in substance from the role of national courts, either in developing the common law or indeed in updating statutes, ..., to make them fit modern conditions’;⁸³ and that ‘safeguards are there to prevent any rapid and arbitrary development of the Convention rights.’⁸⁴

It was not a discussion destined to convince either side, for they were talking from two different assumptions about the changing nature of the Convention, of the ECtHR, and of international law. This is well demonstrated in Letsas’ paper *Two Concepts of the Margin of Appreciation*.⁸⁵ When talking about the margin of appreciation doctrine as adopted by the ECtHR, Letsas differentiates between two concepts of the doctrine: the substantive and the structural. The former encapsulates some form of a formal or substantive rights theory which includes a notion of conditional deference to other co-equal branches of the system, while the latter understands it as a ‘feature of a supranational judicial system, designed to balance the sovereignty of the Contracting States with the need to secure protection of the rights embodied in the Convention.’⁸⁶

In the former case, the methodologies that the ECtHR uses are constitutional rights methodologies, the most obvious being the proportionality test, a doctrine developed in Germany and a staple of the German Constitutional Court,⁸⁷ and its main use is as a tool for balancing public interest with individual rights. In the latter case, the structural approach, a decision of an international court is a zero sum game: any extension in the norms that the international court can interpret and apply is a sovereignty loss, (while it would be a power gain in the international institutions’ ledger), one that has to be justified using the original consent of the states to be bound by such a system and especially by such rules of the game. Consequently, Raab’s question as to ‘[w]hich article mandates the Court to update those rights to reflect its view of societal changes?’⁸⁸ None or all of the articles depending on your starting assumptions. For the former, the substantive argument, this is all part of the background assumptions of what a court does – especially an apex court conducting constitutional or rights review. For the structural approach, the living instrument doctrine is an overreach and an over ambitious use of power by an unaccountable international institution, disregarding the original terms of the agreement and trampling on state consent and national sovereignty. The same

⁷⁹ Q141.

⁸⁰ Q142.

⁸¹ Q140.

⁸² Q139.

⁸³ Q140.

⁸⁴ *ibid*.

⁸⁵ George Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26 *Oxford Journal of Legal Studies* 705; but also see ‘George Letsas, ‘The Margin of Appreciation Revisited: A Response to Follesdal’ in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press 2018), 268 – 309.

⁸⁶ *ibid* 720.

⁸⁷ Generally see Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 73.

⁸⁸ House of Commons, House of Lords, Joint Committee on Human Rights, *Human Rights Judgments*, 13 March 2012, Sir Nicolas Bratza and Erik Fribergh, Q139.

Joint Committee on Human Rights, *Human Rights Judgments*, 13 March 2012, Sir Nicolas Bratza and Erik Fribergh, Q139.

argument in 2012 as the ones Fitzmaurice and Verdross made in 1975, more than 37 years ago.

Before I go on to describing the present situation of the international system and the predicament in which international law finds itself, I will first outline another, also somewhat unsuccessful, intellectual thought that drove the change in the international system. The system finds itself in its present predicament because two intellectual forces pushed it in opposite directions: one, reactionary, hoping to freeze international law in its classical form, and the other trying to transform it into a version of 'humanity's law'.⁸⁹

4. The Hope of Humanity's Law

It was not long after WWII started that the hope for humanizing the international system emerged. Raphael Lemkin and Herch Lauterpacht were writing their treatises on post-war visions of international law, and Lemkin's vision of a special international crime of Genocide⁹⁰ became a reality, when the UN opened the Genocide convention for ratification in 1948. Which brings us to the other dissenting opinion⁹¹ in the ICJ's advisory opinion on reservations to the Genocide Convention. The first group of dissenters saw the majority opinion as an extension of judicial power and an impermissible abandonment of the centrality of state consent to the creation of new international law. On the other hand, Judge Alvarez saw it as an unsatisfactory and timid half-step. He did not mince words about his vision of the future of international law, the proper role of the UN and the ICJ in this new environment, and the place of conventions and state consent in this new law-making dynamic.

After summarising the majority's opinion he went on to say that 'in the future, we shall be forced to abandon traditional criteria, because we are now confronted with an international situation very different from that which existed before the last social cataclysm.'⁹² Consequently, 'it is necessary that the Court should determine the present state of law in each case which is brought before it and, when needed, act constructively in this respect';⁹³ 'constructively' in this sense means law-making when necessary. He explains that doing otherwise would 'fail to understand the nature of international law, which must always reflect the international life of which it is born, if it is not to be discredited'⁹⁴, a living law if not a living instrument. Furthermore, the proper method or mode of thinking for the ICJ was that of 'domestic constitutional law'.⁹⁵ Therefore, when 'upon a revolution, a new republican political *régime* establishes itself in the place of a monarchy, it is obvious that both old and new institutions must at once be applied and interpreted in conformity with the new *régime*'.⁹⁶

Moreover,

There are stronger reasons why the same course should be followed in regard to international law. After the social cataclysm which we have just passed through, a *new order* has arisen and, with it, a *new international law*. We must therefore apply and interpret both old and new institutions in conformity with both this new order and this new law.⁹⁷

⁸⁹ Ruti G. Teitel, *Humanity's Law* (Oxford University Press 2011).

⁹⁰ For a good overview of the two viewpoints between Lauterpacht and Lemkin see Philippe Sands, *East West Street*.

⁹¹ *Dissenting Opinion of M. Alvarez, Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Reports 1951, 15.

⁹² *ibid*, 50.

⁹³ *ibid*.

⁹⁴ *ibid*.

⁹⁵ *ibid*.

⁹⁶ *ibid*.

⁹⁷ *ibid* 50 – 51.

Judge Alvarez was of course talking about WWII when he referred to a social cataclysm, the first time that nuclear weapons were used against other human beings. He goes on to limit his approach and argues that not all international conventions should be subject to this approach, only 'multilateral conventions of a special character'⁹⁸ such as those that establish international organizations, those that are deemed to establish public order like conventions that determine the territorial status of states, those 'which seek to establish new and important principles of international law', and those that 'regulate matters of a social or humanitarian interest with a view to improving the position of individuals.'⁹⁹ The difference between these types of conventions and 'normal' ones is that 'they have a universal character; they are, in a sense, the *Constitution* of international society, *the new international constitutional law*.'¹⁰⁰ Moreover unlike other conventions which are more reciprocal in nature, '[t]hey are not established for the benefit of private interests but for that of the general interest; they impose obligations upon States without granting them rights'¹⁰¹.

Judge Alvarez also saw a crucial symbolic meaning behind the way that these new types of conventions were negotiated and concluded, by a majority vote in the UN General Assembly, compared to other 'normal' conventions. He saw this as the embodiment of the ideas of 'international organization, of the interdependence of States and of the general interest'.¹⁰² Equivalent to a parliament but on a global scale, he saw this principle as a vehicle for a global democracy, where the votes in the General Assembly would represent a sort of general will in the spirit of Rousseau – 'national sovereignty has to bow before the will of the majority by which this general interest is represented.'¹⁰³ The General Assembly was, for Judge Alvarez, simply fulfilling a legislative function when voting on these types of conventions. Consequently,

These conventions must be interpreted without regard to the past, and only with regard to the future. Nor must they be interpreted in the light of arguments drawn from domestic contract law, as their nature is entirely different.¹⁰⁴

For Judge Alvarez, their nature was to become the constitution of international law.

Judge Alvarez's vision did not fully come to pass, but the next forty years saw gradual developmental milestones towards that future. As Judge Fitzmaurice noted, slowly international human rights conventions, some under the UN auspices and some under regional arrangements, came into existence. More and more states signed up to them, and a large number also accepted the optional individual complaints mechanisms that Judge Fitzmaurice tried to preserve with his dissent. The International Law Commission worked on preparing a statute of an international court dealing with international crimes,¹⁰⁵ work that later fed into the drafting of the International Criminal Court (ICC). No less important, the world decolonized, at least legally if not economically, expanding the number of states that made up the international system. Where once was a small club of 51 states pre-1945, there are now more than 193. A world of 51 states can run on interpersonal diplomacy, a world of 193 runs on rules and bureaucracy. Or it breaks down.

It was not until the fall of the Berlin Wall that hopes of a new international system picked up full steam again. For example, in 1992 Fukuyama published his book *The End of History*,¹⁰⁶ where he explored a possible future world order which, because of the end of humanity's last

⁹⁸ *ibid* 51.

⁹⁹ *ibid*.

¹⁰⁰ *ibid* (emphasis in the original).

¹⁰¹ *ibid*.

¹⁰² *ibid* 52.

¹⁰³ *ibid*.

¹⁰⁴ *ibid* 53.

¹⁰⁵ See the *Report of the International Law Commission on the work of its forty-sixth session* (2 May-22 July 1994), UN Doc. No. A/49/10, *Draft Code of Crimes Against the Peace and Security of Mankind*, para 23 – 209.

¹⁰⁶ Francis Fukuyama, *The End of History and the Last Man* (Free Press; Maxwell Macmillan 1992).

ideological struggle between liberal capitalism and communism, would be largely liberal capitalist, with a few holdovers; major ideological conflicts would be very unlikely, while there still might be small conflicts or trade wars.¹⁰⁷ For him, the struggle to define what it is to be modern was over.¹⁰⁸ At the time when Fukuyama wrote his book, there was a general sense that this was the period when the world would become more open, more secure and more democratic, and there was some evidence to support this enthusiasm in the Freedom House annual reports, which showed large increases in freedom across the world in the 80's and 90's.¹⁰⁹

For instance, in the same year, 1992, Thomas Franck published *'The Emerging Right to Democratic Governance'*, arguing that a new emerging law was 'rapidly becoming [...] a normative rule of the international system'.¹¹⁰ He argued that governments were increasingly coming to the recognition 'that their legitimacy depends on meeting a normative expectation of the community of states', and that that expectation was that 'those who seek the validation of the empowerment patently govern with the consent of the governed'.¹¹¹ Franck believed that in the changing order of the post-Cold War world, democracy was 'becoming a global entitlement' of individuals, one that 'will be promoted and protected by collective international processes'.¹¹² He envisaged that the right to democratic governance (within states) would become a 'requirement of international law, applicable to all and implemented through global standards'.¹¹³

Franck was talking about the trend of international efforts in spreading democracy after a period of fierce ideological contestation over the proper form of political and economic systems. These efforts were not only championed by powerful democratic nations, but by international organizations like the UN, as part of their transitioning mechanisms from conflict or crisis to peace and stability.¹¹⁴ Moreover, as Franck saw, these norms were gradually being cemented into international treaty or customary norms through human rights treaties and courts, as well as activities on the part of the UN in peacekeeping and peace enforcement actions. Where Weil saw the rise of soft-law instruments as a threat to international law, Franck saw those same instruments ushering a new way of domestic governance, one that had the potential to bring about a stable and long-lasting democratic peace.¹¹⁵ In essence, he envisaged the reversal of the 1944-45 Dumbarton Oaks compromise on membership in the UN and the global community as dependent only on the peaceful intentions of a state, irrespective of its choice of economic and political system.¹¹⁶ Soon, only a democratic system would be an acceptable system of national governance and the UN would not be so ambiguous as to a state's domestic make up. He was not that far off the mark. For instance, states declared in the 2005 World Summit's final resolution that they 'reaffirm[ed] that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives' and also affirmed their

¹⁰⁷ For picking up on the ideas of Huntington and how it reflected thinking of the international order see Marjan Ajevski, 'Post-National (International) Law at the End of History' (2016) 4 *International Politics Reviews* 45.

¹⁰⁸ Francis Fukuyama, 'The History at the End of History' *The Guardian* (London, 3 April 2007) <<https://www.theguardian.com/commentisfree/2007/apr/03/thehistoryattheendofhist>> accessed 02 October 2020.

¹⁰⁹ Freedom House, Freedom of the World Data and Resources, <<https://freedomhouse.org/countries/freedom-world/scores>> accessed 02 October 2020.

¹¹⁰ Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46, 46.

¹¹¹ *ibid.*

¹¹² *ibid.*

¹¹³ *ibid.* 47.

¹¹⁴ *ibid.* 87 – 88.

¹¹⁵ The idea of a democratic peace started with Kant who argued that, for structural reasons, constitutional democracies do not go to war with each other, although they do go to war with other countries, Immanuel Kant, *On Perpetual Peace - a Philosophical Sketch* (Richer Resources Publications 2012); Kant's original inspiration does seem to still hold true – democracies do not go to war with each other, the only exception being Finland and the Allies in WWII.

¹¹⁶ See more in Simpson, 'Two Liberalisms'.

'commitment to support democracy by strengthening countries' capacity to implement the principles and practices of democracy'.¹¹⁷

The decade and a half following Franck's article saw major developments towards his vision: the number of signatories of human rights conventions grew, as well as the number of democracies. The ICC was negotiated and established in 1998, following a slew of several *ad hoc* or hybrid international criminal tribunals. Universal jurisdiction was seen as more readily acceptable, albeit still politically sensitive.¹¹⁸ States were more willing to recognise the concept of humanitarian intervention into another state(s) territory under certain circumstances.

I will take the example of humanitarian intervention, or more specifically the Responsibility to Protect (R2P) principle to illustrate this point. Following NATO's intervention in Kosovo in 1999, a debate about its legality started to gain traction. The Independent International Commission called it 'illegal, but legitimate':¹¹⁹ a necessary violation of state sovereignty for the purposes of preserving life and preventing international crimes. While armed intervention was nothing new in international relations,¹²⁰ Article 2(4) of the UN Charter specifically prohibited member states from using in their international relations 'the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the UN'.¹²¹ While this prohibition was one of the cornerstones of the post-Second World War consensus, the rise in non-international conflicts and in the capability of certain states to respond quickly to mass human rights violations put a strain on that consensus.

As a response, Canada hosted an International Commission on Intervention and State Sovereignty whose report, 'The Responsibility to Protect',¹²² outlined the possibility of an emerging exception to the Article 2(4) prohibition. The report was not universally welcomed, especially by countries in the global South.¹²³ Nevertheless, the UN picked up the report and, in the lead to the UN World Summit 2005, the Secretary General made an effort to make states accept some of the principles of R2P. While in the summit outcomes the states did not accept intervention as a principle, they did affirm the obligation of states to protect their populations from mass atrocities.¹²⁴

This was enough for the Secretary General to continue working on the issue, and in 2008 the Secretary General issued a Report on implementing R2P which constructed the obligations of states towards individuals in three pillars: '[p]illar one is the enduring responsibility of the State to protect its populations, ... [p]illar two is the commitment of the international community to assist States in meeting those obligations, and [p]illar three is the responsibility of Member States to respond collectively'¹²⁵ in cases where states do not meet the responsibilities of pillar one. Of course, the Secretary General also made it clear that the proper procedure for carrying out R2P was through the UN and especially the Security Council.¹²⁶

¹¹⁷ World Summit Outcome, UN General Assembly Resolution, UN Doc. A/60/L.1, 15 September 2005, para 136.

¹¹⁸ Máximo Langer, 'Universal Jurisdiction Is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven'universal Jurisdiction' (2015) 13 *Journal of International Criminal Justice* 245.

¹¹⁹ The Kosovo Report: Conflict, International Response, Lessons Learned, Independent International Commission on Kosovo, (Oxford University Press, 2001), 4 assessing the NATO air campaign, but also see Koskeniemi 'Constitutionalism as a Mindset'.

¹²⁰ For a good overview of the law on the use of force including in situations of humanitarian intervention see Christine Gray, *International Law and the Use of Force* (Oxford University Press 2018).

¹²¹ Article 2(4) of the Charter of the United Nations.

¹²² Report of the International Commission on Intervention and State Sovereignty, December 2001, <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> accessed 02 October 2020.

¹²³ Gray, *International Law and the Use of Force* 175 – 176.

¹²⁴ UNGA, World Summit Outcome, UNGA Resolution, (15 September 2005), UN Doc. A/60/L.1, para 138 – 140.

¹²⁵ UNSG, Implementing the responsibility to protect Report of the Secretary General to the General Assembly, (12 January 2009) UN Doc. A/63/677, para 11.

¹²⁶ *ibid.*

This brings us to Humanity's Law, the phrase that Ruti Teitel coined to describe the direction in which she saw international law move in the 1990s and 2000s. She argued that because of the developments in international human rights and their enforcement through international courts through individual petitions, the developments in humanitarian and international criminal law, and the rise of transitional justice as a peacebuilding mechanism, international law is moving away from the standard account of what the *subject* that it is supposed to regulate is, and who is it actually designed for. She observed that there was a 'growing interconnection without integration' in a world where 'power is exceptionally fragmented and disorganized – [... or put differently] very complexly diffused.'¹²⁷ In this structure, humanity's law 'affords a language and a framework that [is] capable of recognizing the claims and interests of multiple actors in preservation and security, both individual and collective.'¹²⁸ It strives for 'a basis for legitimacy that is derived from humanitarian values and concepts of humanity rights and human security.'¹²⁹

Unfortunately, it was not to be. In the previous two sections, I portrayed the two broad forces that have dominated the development of international law and the international system since WWII. While it was becoming obvious that the international system would no longer be the small club of European or Western states, for the classicists, there was no reason to believe that international law could not continue to strive towards its classicist ideal, a system of states with a clear inside/outside division where it is up to the state how it organises its domestic affairs. Coexistence, 'in peace, if possible; in war, if necessary',¹³⁰ in a pluralistic society was the aim; normatively neutral law was the means to achieving that aim (regardless of how impossible it might be to have actually 'neutral' international law).

For reformers, the classical inside/outside division was exactly the problem for it meant that the full extent of the Holocaust committed against German Jews and other German groups Germany's territory would not be a crime, while a war of aggression (a breach of sovereignty) would. The London Charter setting out the International Military Tribunal is the perfect example of this tug of war between the two: Article 7 lists the crimes as: a) Crimes against peace, b) War Crimes, and c) Crimes against Humanity where the a) and b) were regarding the 'war of aggression', and c) were 'committed against any civilian population' including one's own. The Judge Alvarez of the world gradually eroded the 'inside', created normative systems where human beings became the centre of protection, and gradually wanted to displace the power of the state governments, by diffusing power outside and inside. Their idea was to reform the world towards a more broadly liberal model.¹³¹ The classicists resisted it all the way, believing that there was something worthy in a system that prioritised artificially constructed entities over human beings. It is this tension between reformers and detractors that created the current international system. So, what does it look like now?

5. Where We Are Now - the Rise of Global Governance

Weil's lament regarding the blurring of normative thresholds in international law was largely correct and, if anything, has accelerated in the new millennium. The openness, the rising interconnectedness and interdependence of the world, the breadth and depth of cross-border and international regulation merely accelerated that process by creating the need for less formal, more expedient law-making (or more properly, norm-making) processes. In their seminal piece Kingsbury, Krisch and Stewart talked about the rise of what they termed Global

¹²⁷ Teitel, *Humanity's Law* 216.

¹²⁸ *ibid.*

¹²⁹ *ibid.*, 217.

¹³⁰ Weil, 'Towards Relative Normativity in International Law' 419.

¹³¹ Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017).

Administrative Law (GAL).¹³² GAL is a response to a new phenomenon, global governance: a messy and chaotic stew of actors, norms, and pathways of law-making and law application.

So, what is global governance? Unlike the clean story of the international system and international law, global governance does not start with the state as being the main or even at times the most powerful actor. It actually sees a multiplicity of actors, whom Kingsbury et al call subjects – they are both the addressees of legal norms and their creators.¹³³ These actors operate in different formal or informal arrangements. These can take the form of outright international administration such as the UN Security Council or its ancillary bodies and affiliated organizations, or they can also take the form of transnational networks based on informal communication and cooperation around common issues such as the Basle Committee, which coordinates monetary policy or banking regulation across the global economy. Another model of governing a specific area are the distributed administration networks, usually taking the form of a network of regulators that create and enforce regulation transnationally using a formal framework as a basis for their operation, a good example being environmental agencies working under the framework of different environmental target setting treaties. The forms of governance does not end there, we also have intergovernmental-private administration, which are hybrid bodies that ‘combine private and governmental actors’¹³⁴ to regulate a certain aspect of transborder activity, for e.g. the internet address protocol and the assigning of internet names, which is handled by a non-governmental body¹³⁵ that includes government representatives. Finally, and not least importantly there are outright private bodies that regulate transborder economic activity such as the International Standardisation Organization or the Anti-Doping Agency which regulate certain aspects of global activities but whose governing members are mostly private organizations impacting mostly private companies or individuals such as athletes.¹³⁶

This increase in actors as subjects of international law requires a shift into the way that we analyse states and their actions in the increasingly complex international system. In 2004, Anne Marie-Slaughter pioneered the term disaggregated states,¹³⁷ urging us to ‘[s]top imagining the international system as a system of states – unitary entities like billiard balls or black boxes—subject to rules created by international institutions that are apart from, ‘above’ these states.’¹³⁸ Rather we should be thinking about the world as a ‘world of governments’ with legislative, adjudicatory and implementation branches that interact both ‘with each other domestically and also with their foreign and supranational counterparts.’¹³⁹ States are still ‘crucial actors, [b]ut they are ‘disaggregated’¹⁴⁰ and they interact with each other not only through their foreign affairs ministries but also through ‘regulatory, judicial, and legislative channels.’¹⁴¹

However, it is not just that the different layers of this disaggregated state interact with the layers of other states or international institutions (e.g. international courts, or international organizations). Entities that in the classical narrative of international law had no place or standing suddenly become powerful actors on the international stage. It also represents the

¹³² Benedict Kingsbury, Nico Krisch and Richard B Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and contemporary problems* 15; Nico Krisch and Benedict Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) 17 *EJIL* 1.

¹³³ Kingsbury, Krisch and Stewart, ‘The Emergence of Global Administrative Law’ 23 – 25.

¹³⁴ *ibid* 22.

¹³⁵ The Internet Corporation for Assigned Names and Numbers (ICANN)

¹³⁶ Kingsbury, Krisch and Stewart, ‘The Emergence of Global Administrative Law’ 20 – 23.

¹³⁷ Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004).

¹³⁸ *ibid* 5.

¹³⁹ *ibid*.

¹⁴⁰ *ibid*.

¹⁴¹ *ibid*.

'breakdown of the classical separation model for dealing with international affairs.'¹⁴² In the classical narrative, states were able, at least legally, to close off their internal order from the international. States' gatekeeping tools allowed them to close their internal legal and political system from direct interaction with the proverbial 'outside', a strict binary of internal and external.

But that is no longer the case; in the same way as international subjects have changed – there are more entities that can create norms transnationally than the standard account allows – so have the pathways through which the 'outside' can pierce the bubble of national sovereignty.¹⁴³ International human rights courts like the ECtHR are early examples of this. In his testimony, Sir Nicholas was quite open regarding this when he specified that national courts are the natural partners of the ECtHR. The ECtHR over decades of work (that in most cases did not require a systemic legislative overhaul) had created a network of courts where its judgments were implemented by national courts, bypassing the traditional gatekeepers of Foreign Office ministers, ambassadors or parliaments.¹⁴⁴

This has altered the traditional calculation regarding the legitimacy of law-making. In the classical system, all international law rested on the presumption of – tacit if not explicit – state consent. This worked well for democratic states with substantive rule of law because they could legitimize what came from the international system through their constitutional mechanisms. But once states were no longer the only or even the main norm creators, democratically legitimizing those norms became increasingly difficult. This does not represent such a big problem for the executive branch (although the prisoner vote controversy in the UK offers a counter example), since they mostly gained power vis-à-vis the other branches of government,¹⁴⁵ but it certainly presents problems for individuals. As an example, following the September 11 attacks on the US and the responses to it, individuals could be put on a terrorist sanctions list created at the UN Security Council level (in which only 15 states sit) and implemented through global regulatory networks without the possibility for review, judicial or otherwise.¹⁴⁶

There have been many proposals to fix the perceived legitimacy deficit of international law, that we can broadly put into three main categories: GAL, global constitutionalism and cosmopolitanism. Most of them draw inspiration from domestic legal institutions of democratic rule of law states. GAL borrows from administrative law concepts like transparency, procedural participation, reasoned decisions, possibility for review with substantive standards in place like proportionality, means-ends rational basis tests, and legitimate expectations.¹⁴⁷ Global constitutionalist scholars, on the other hand, borrow from substantive constitutional concepts like rule of law, human rights, subsidiarity and complementarity, and checks and balances,¹⁴⁸ making public autonomy the main ordering principle of a plural international system.¹⁴⁹ Some even call for the modelling of international law on the fundamental concepts of national public

¹⁴² Nico Krisch, 'Global Governance as Public Authority: An Introduction' (2012) 10 *International Journal of Constitutional Law* 976, 977 – 8.

¹⁴³ Laurence R. Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *The Yale Law Journal* 273.

¹⁴⁴ Anne-Marie Slaughter, 'Sovereignty and Power in a Networked World Order' (2004) 40 *Stanford Journal of International Law* 283.

¹⁴⁵ Follesdal and Hix, 'Why There Is a Democratic Deficit in the EU'.

¹⁴⁶ T-315/01, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Court of First Instance of the European Union, 21 September 2005; C-402/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Judgment of the Court (Grand Chamber) of 3 September 2008; also see De Sena, P. and M. C. Vitucci, 'The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values' (2009) 20 *EJIL* 193.

¹⁴⁷ Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law' 37 – 42.

¹⁴⁸ Kumm, 'The Cosmopolitan Turn in Constitutionalism' 277.

¹⁴⁹ Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (1st edn, Oxford University Press 2012).

law.¹⁵⁰ Cosmopolitanism is less institution-focused and does not deal with suggestions for institutional change as such, but rather seeks a change in how we view the basis of the international system, centring more on individuals and their universal moral worth as human beings. Its emphasis on the universality of human rights means that cosmopolitans strive to reduce the differences between citizenship, residency and statelessness and work globally and nationally towards institutions that reflect those ideas.¹⁵¹

While all of these strains of thought offer, more or less, workable solutions to the international system's legitimacy problem, they do not have broad support. They represent an answer to the problems that global governance poses to functioning or aspiring liberal democracies, not to authoritarian or illiberal democratic regimes that do not put the rule of law, human rights, and widening participation of individuals in high esteem. Simply put, why would China or Russia want to embrace or even encourage global institutions and procedures that could be used to empower liberal groups domestically?

And this is the crux of the problem for liberal democracies: we are currently in an international system of global governance where the standard legitimization tools are no longer fit for purpose. The current system of global governance alters the domestic balance of powers towards the executive branch or towards private transnational actors, to the detriment of individuals. Even if all countries were democratic, it would still not resolve the tension since global problems will require global institutions to tackle them. At the moment, global institutions can bypass the traditional gatekeeping mechanisms found in constitutional systems and are overwhelmingly designed for participation by the executive branch. This can lead to the executive being able to: use this position to smuggle through unpopular, undemocratic, illiberal norms and policies from the international to the national system; be captured by private multinational corporations or other non-state actors to promote their interest; or a combination of the two. Global problems require global institutions to tackle them, but if constitutional liberal democracy is to thrive, global institutions will need to be open to global politics fought over a global polity. How this will look is yet unclear but there are a number of proposals on the table.¹⁵²

The same does not apply to authoritarian or illiberal regimes – they do not have the same commitment to the rule of law, accountability, or human rights as liberal democracies. For them, empowering the executive vis-à-vis the courts or parliament is regarded as a useful feature, not a problem of the international system, certainly not one that needs fixing. Similarly, there are not private actors in illiberal democracies or outright authoritarian regimes in the same way that there are in liberal democracies, either legally or politically speaking. A multinational Chinese company is not really separate from the Chinese state in the way that Google or Apple are in liberal democracies. Google and Apple are regulated but separate from the US government, that is not so clear about the Chinese tech giant Huawei. Consequently, autocracies and illiberal democracies see the proposed changes as something to be resisted, something that could alter the power balance domestically, and they are unwilling to commit to changing the current makeup of global governance in a way that empowers individuals. So, what are the ways forward for liberal democracies?

¹⁵⁰ Armin von Bogdandy and Ingo Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (Oxford University Press 2014).

¹⁵¹ Garrett W. Brown and David Held (eds), *The Cosmopolitanism Reader*, (Polity 2010).

¹⁵² See for instance Anne Peters' contribution in the book Klabbers, Peters and Ulfstein, *The Constitutionalization of International Law*; but also see the writings of Bogdandy and Venzke eg A. von; Bogdandy et al (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010); or Bogdandy and Venzke, *In Whose Name*.

6. The Long-Term Status Quo?

In his 2019 Hersch Lauterpacht memorial lecture,¹⁵³ Tom Ginsburg talked about the consequences of the economic rise of China and other authoritarian regimes around the world for international law and global governance. He envisioned that, due to their growing economic importance, China and other illiberal or authoritarian countries will have an increasing influence in the way that international governance operates. Namely, these types of states have an outsized preference towards governance structures that rely less on hard rules and more on flexible, and consequently more political, ways of handling international issues. Therefore, the wonderful web of international courts that has sprung up in the last three decades, especially those with constitutional and administrative type features,¹⁵⁴ will slowly be eroded by these actors. These countries will still have a need for hard rules in regulating economic matters like trade and foreign investment; but in most other areas, especially in humanitarian and human rights matters, they will slowly attempt to erode them. Therefore, human rights and humanitarian issues will be gradually relegated to regional governance arrangements that have a longer commitment to those values, such as the Council of Europe or the Organization of American States, which have the European and American Conventions on Human Rights respectively. The Association of East Asian Nations (ASEAN) or the new Eurasian Economic Union would be the model regional organizations of the future, rather than the European Union.

Ginsburg offers a sobering view of the future developments in global governance, but misses a couple of counterpoints. While China's GDP has surpassed the US and EU's individually,¹⁵⁵ it is still slightly more than half of them combined, let alone in combination with other liberal democracies like Canada, Australia and New Zealand. While China's GDP is projected to grow at a sustained above average pace, it is likely that it will slow down in the not-so-distant future. It is hard to see why liberal democracies would easily give up their benefits and protections, like an international order based on law, rules and rights, and accept a governance structure that erodes existing protections. Consequently, we might go into an era of a prolonged status quo, provided that liberal democracies manage to survive the current populist wave.

However, rather than having a liberal, open, and integrated international order, something that the humanity's law proponents argued for, we might end up with a more regionalized world, where regional organizations become the centres of organization and politics for that region. Global institutions like the UN will still matter, but they will matter in different ways: rather than promoting human rights and human security, they will promote stability, national security, and cooperation, but cooperation in trade or climate change, but may not emphasise climate justice. Liberal democratic states will try to insulate themselves from the effects of such institutions where they do not have the same or similar guarantees of voice, accountability, or review. Moreover, they might also try to re-balance the domestic constitutional mechanisms, thereby bringing more checks on the executive branch's foreign affairs powers, such as judicial review of concrete executive claims or actions.¹⁵⁶

¹⁵³ Tom Ginsburg, Hersch Lauterpacht Memorial Lecture 2019: 'Democracies and International Law: The Trials of Liberalism (Part 3)', (Lauterpacht Centre for International Law 14 March 2019), <<https://upload.sms.csx.cam.ac.uk/media/2939251>> accessed 02 October 2020.

¹⁵⁴ Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014), where she categorises the 4 types roles that international courts can take: dispute settlement, administrative review, enforcement, and constitutional review, 3 – 31.

¹⁵⁵ OECD data as of 2016 available at <<https://data.oecd.org/gdp/gross-domestic-product-gdp.htm>> accessed 12 June 19.

¹⁵⁶ In the UK, the *Miller* case curtailed the power of the UK Government to unilaterally withdraw from international treaties that affect human rights, which include the EU treaties - *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*, [2017] UKSC 5; while in *Law Society of South Africa and Others v President of the Republic of South Africa and Others*, [2018] ZACC 51, the Constitutional Court of South Africa called President Zuma's actions – in cooperation with other member states of the South African Development

But on the whole, the current global order of governance without a government will continue – dragging along its legitimacy problems, since liberal democracies who see them as problems rather than benefits will not have the power to reform the world to their liking. Consequently, we might be headed towards a mid to long-term status quo in the global order. It will be different from the post-Second World War balance of powers between two powerful blocs, since the powerful actors will still have substantial interconnectedness, mostly in free trade, finance, migration and tackling human-made climate change. There will be much greater openness between nations than there ever has been in human history, but it will not be on liberal democratic terms. Sadly, Fukuyama's prediction of a future world order populated with liberal democracies will not come to pass. The opportunity for it was squandered by foreign adventures in the 2000s by the major liberal democracies. Although for while there might not be a great ideological struggle over what is the best political/economic order for humanity, there will be a struggle in liberal democracies over what is the best political/constitutional order for us as a people, a country or a continent.

Community (SADC) to strip the SADC court of its human rights jurisdiction – as 'unconstitutional, unlawful and irrational' (para 7) preventing his further participation towards ending the SADC court.

How We See the Law

Chapter 6

Desire Lines*

Robert Herian

Abstract

Desire lines occur wherever we find human and animal movement. Desire lines dissect the planned spaces of Milton Keynes and have done since its creation 50 years ago, and they will continue to show us how people use, abuse, and manipulate the spaces of Milton Keynes long into the future. Accompanying Robert Herian's chapter is a short video installation¹ bringing together local council planning documentation, bureaucratic theory, personal accounts, storytelling, photography, and music to describe the nature and power of desire lines in our lives and imaginations.

1. First impressions

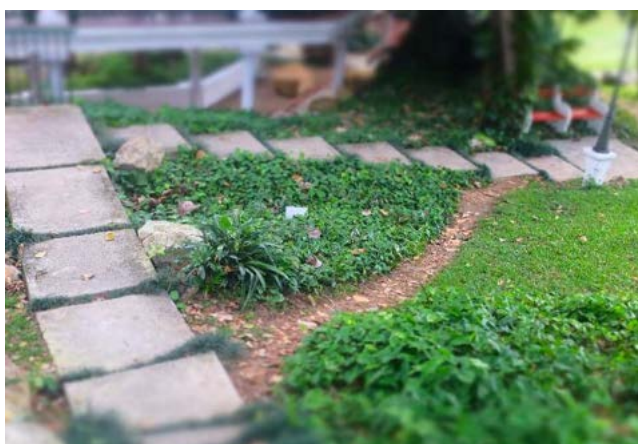


Figure 1: Just that bit quicker! Image by Robert Herian

You will probably use a desire line in your life or already rely on one to make a habitual journey on foot or bicycle just that bit quicker. At the very least you will have seen these lines criss-crossing the grass of a local park between 'formal' pathways or bisecting a verge by the side of a main road to give the user a more direct route to the other side. A desire line is an *informal path* that enables a *direct journey*, what we might also call a *short-cut* or in some circumstances a *detour*. As well-trodden pathways, desire lines imply a wish for *straightforwardness* and greater *efficiency* than planned spaces provide. However, desire lines are more sophisticated and nuanced than this,

and calling them "short-cuts" or a more efficient means of getting from A to B does not fully explain what they are or how, why and when they appear as they do in the landscapes.

* This Chapter came out of the project, Desire Lines, by Dr Robert Herian and the artist Lucy Atherton. For more information on Lucy's work see: <www.lucyatherton.com>.

¹ To see the short video installation please visit: <http://www.open.ac.uk/blogs/50YearsOfLaw/?p=73>. This page is part of our 50 Years of Law blog, where we showcase this and other research from the Law School. Please visit the page <http://www.open.ac.uk/blogs/50YearsOfLaw/> to find out more and join the discussion..

Pathways are physical *impressions* left on a landscape by moving bodies, someone walking, riding a bike or horse for example. We can equally interpret desire lines as social, political, cultural, ecological, psychological, legal and economic *forms, expressions* or *representations* made by individuals and communities. Often, they are a combination of these. This makes desire lines complex *phenomena* capable of showing us something not only about the way we (individuals or communities) leave our mark on landscapes, but how we *experience* and *belong* (live, work, enjoy leisure time) in a landscape both consciously and unconsciously. What we think of as our *desire* is unknown to us, as Sigmund Freud described, because it is beyond conscious knowledge and understanding. When we apply Freud's reasoning to the "desire" in "desire lines", therefore, we find veiled meaning and hidden truths in the pathways we use.

The aim of this Chapter is to critically evaluate the phenomena of desire lines from a variety of perspectives. By exploring what lies behind or beneath desire lines, the aim is to reveal meanings that all too often go unseen in the landscape, and in communities, societies, even the world, in which we live. As a lawyer, I'm keen to explore the way desire lines embody but also resist and disregard laws and social norms. Law does not exist in a vacuum, and we should always see it *in context*. As Baroness Hale famously declared: 'In law, "context is everything"'². To appreciate the relationship between law and desire lines means appreciating the dialogue between law and the contexts in which law operates. Understanding law in this way shows us something's ultimate legal character, even a humble pathway. There's a lot of ground to cover, so let's get started.

2. (In)formal Pathways

As "informal" pathways, desire lines offer alternatives to existing ways within normative and usually highly planned spaces such as housing estates, town centres, or public parks. The distinction may seem straightforward, but it is important to understand, precisely, what makes a pathway either "formal" or "informal". There are two obvious examples of formal pathways, both of which are defined by the *Highways Act 1980*: footways (pavements or sidewalks) and footpaths³. We find both in urban and rural landscapes and make up the wider highway network.

² *Stack v Dowden* [2007] UKHL 17, 69.

³ *Highways Act 1980*, s 329(1): "footpath" means a highway over which the public have a right of way on foot only, not being a footway; "footway" means a way comprised in a highway which also comprises a carriageway, being a way over which the public have a right of way on foot only.



Figure 2: Footpath & Footway. Images by Robert Herian

Of the two perhaps public footpaths, especially in the countryside, seem less planned than their asphalt counterparts, pavements. Yet, both show human ingenuity in planning routes and journeys that inscribe the physical landscape, while creating *rights of way* that describe legal character within the landscape. For good or ill, and like writing on a page, pathways tell stories of movement through traces that begin tentatively (informally) but inevitably become fixed and formal. The formalization of pathways is described in law by the establishment of rights of way:

The most common way that rights of way come into existence is by presumed dedication. There is a long established principle that extensive use by the public without challenge can provide evidence that the landowner intended to dedicate the used route as a public right of way. Presumed dedication can take place by common law or statute law. Statute law requires a period of use of 20 years from the point the use of the path is questioned. Common law dedication may require less time⁴.

⁴ Emma Downing. 'Establishing in a Right of Way' (*House of Commons Library* 2011) <<https://researchbriefings.files.parliament.uk/documents/SN06026/SN06026.pdf>> accessed 13 May 2019.



Figure 3: Enjoy the land! Image by Robert Herian

Establishing and importantly also formally recording rights of way, on an Ordnance Survey map, for example, has long been important to ramblers and those who enjoy walking in the countryside. Accurate knowledge of rights of way opens the countryside for exploration. It would be too much of a distraction to talk in depth here about property law. But, worth briefly noting is that, whilst we might commonly think of “property” as a physical thing such as a car or a piece of land, the law regards it instead as a *bundle of rights*. Among these rights is the right to exclude, which, in land, means the right to stop people from entering (trespassing) or crossing privately owned land. One reason a right of way is significant, therefore, is because it represents a compromise between owners

and non-owners within the context of a broader private property regime. While the right to exclude absolutely might be preferable economically (it can secure and maintain land value for example, e.g. in cases of so-called “land-banking”), from the point of view of social and what we might also call *spatial* justice, including giving people a reasonable opportunity to explore and enjoy their environment, rights of way are a precious if limited sharing of space.



Figure 4: Disciplining movement. Image by Lucy Atherton

Wherever we turn in towns, cities and the countryside, we must negotiate planned spaces that, even when thought of as “public” like a canal path for example, are in fact shaped by private ownership and the rights that ownership entail. Formal pathways are just one example of how planning rules and norms overseen by private property law and a variety of other regulations govern and discipline movement. Signs and defensive architecture, like the barriers and fences in figure 4, with pathways, channel movement and ensure walkers and other users of the pathways stay on the right path, so to speak. Formal paths, in this sense, are thick with metaphor but also reflect contemporary bureaucratic concerns to manage demands for efficiency and mitigate

risk. The aim is to ensure, as far as possible, control over and predictability of individual and collective movement. Whilst the likelihood of injury or death to occur if the mix between cars and pedestrians is not planned for or managed properly suggests some bureaucracy is a good thing, the notion that one is not fully in control of where or how one moves through the landscape (the essence of being governed and disciplined) is more jarring to our sense of self. For Michel Foucault, for example, the governance and discipline of movement is one element that produces ‘docile bodies’. The individual body becomes an element that others may place, move, or articulate: ‘Its bravery or its strength are no longer the principal variables that define it; but the place it occupies, the interval it covers, the regularity, the good order according to which it operates its movements’⁵.

⁵ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trn, Penguin 1991) 164.



Figure 4: The "Official Route". Image by Robert Herian

It is often useful to be told which way to go. A well-worn path and clear signs that point the way make life easier, require less self-planning or initiative, and make the experience of a journey less stressful. Many of us probably accepted long ago, without even really noticing, complacency towards planned space that makes us easily annoyed when we lose the path. Re-tracing your steps is time consuming and can take you in the wrong direction after all. Through a bureaucratic lens, losing the pathway has a negative impact on efficiency, so we must require more planning.

The idea of stepping off or leaving the beaten track may be romantic or fill us with a gratifying sense of

mischievous. As alternatives to the norm, desire lines are manifestations of a type of rejection of formality and thus also an attempt to reject the discipline that accompanies it. Yet we all eventually fall back into line, return to the paths we *should* be on, don't we? Desire lines exist only to bring points of formality closer together, not to undo or destroy formality, or postpone it indefinitely. When we stop to think about this, of course, the very idea of leaving the beaten track, romantic or not, means nothing without having a beaten track to begin with. Law clearly makes distinctions between formal and informal pathways, but as the title of this section implies, what is formal is always already (in)formal. Informality breeds formality, and informal ways, in turn, are re-found in formal, planned spaces. All pathways intertwine to produce what Michel de Certeau calls 'a rhetoric of walking':



Figure 5: The Efficient Route. Image by Robert Herian

Walking affirms, suspects, tries out, transgresses, respects, etc., the trajectories it "speaks". All the modalities sing a part in this chorus, changing from step to step, stepping in through proportions, sequences, and intensities which vary according to the time, the path taken and the walker. These enunciatory operations are of an unlimited diversity. They therefore cannot be reduced to their graphic trail⁶.

Well-known sayings such "off the beaten track" or "off-piste" describe something like the deviation from the normal way of doing things (the formal path) that desire lines culturally represent. "Cutting corners" is another well-known saying usually used to describe someone who has performed a job or task poorly or cheaply, perhaps also with a lack of attention to detail or even illegally. To cut corners is a pejorative term not used to describe a person who has been well meaning in striving for efficiency but excessive in their stinginess, perhaps even reckless or negligent. Yet, a desire line that "cuts corners" is the best and, perhaps, the only authentic kind of desire line there is.

⁶ Michel de Certeau, *The Practice of Everyday Life* (Steven Rendall trn, University of California Press 1984) 99.

3. Auditing a Landscape: The Public Park

How do law and legal norms shape space and the way bodies experience and move through it? Bodies can respect, defy and resist laws, but never disregard them. As a strategy for the coming day, we intertwine the political with law in accounts of property, spatial justice, and the negotiations of socialized bodies, each with desires, demands, anxieties and frustrations. Recognizing points in which law and bodies meet in space in subservience to (or the creation of) norms is difficult, however. Law, all too often, is invisible, unconscious, missed. A desire line across a local park represents combinations of *forms* and *expressions*. Using an image of a typical park, like the one in *figure 7*, we can audit the space for its material and symbolic content to examine these forms and expressions.



Figure 6: "Desire line" by Eric Fischer is licensed under CC BY 2.0

Based on the line of sight in *figure 7*, we see the desire line cutting straight-through into the distance, along a path that deliberately bisects and rejects the planned order. Just because it rejects the planned order does not mean those who use it will avoid the discipline imposed by the space (the park) as a whole, however. We can assume the goal for most users is to proceed more directly and quickly than meandering around the formal path and this use of space, even in its relative informality, describes discipline. We can, for example, imagine users of the park who may choose to walk the desire line, some to increase their efficiency in terms of time, energy and so on, but for others this may only be a second-order consideration:

- Someone rushing through the park to reach the station for the morning train to work: if he misses the train today, he may lose his job.

- Someone jogging to get fit after a long period of recuperation following a hip operation: she knows the more exercise she does, the quicker her recovery will be, but the shorter route is just that bit easier.
- Someone walking their dog: they use the desire line out of habit because the dog always goes that way.
- Someone taking their child to school: they wouldn't normally walk through the park, but it's a sunny day and they like to spot birds.
- Someone working as a bicycle courier: she isn't meant to ride through the park but will get a bonus if the delivery is quicker than promised.

Parks are public spaces in the sense that anyone is free to use one for recreation or, perhaps, as a more pleasant route to avoid pedestrian traffic and busy roads. Because we call a park "public", however, does not mean people can do as they please there day or night. This might mean, for example, closing park gates each evening to prevent entry after a set time. Locking the gates on a park touches on several social policy issues, including those relating to rough sleepers and the homeless prevented from using the space after it is "closed to the public".

Section 3 of the *Vagrancy Act* 1824, for example, describes as an offence an 'idle and disorderly person' 'wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms'. More recently the government *Rough Sleeping Strategy* describes people sleeping rough as: 'People sleeping, about to bed down (sitting on/in or standing next to their bedding) or actually bedded down in the open air (such as on the streets, in tents, doorways, parks, bus shelters or encampments)'⁷.

Based on this single example, we can see that, while parks are public the space is *governed*, *regulated*, and *managed* under the direct control of a council (county, district or borough) or some other authority that has a legal power to exclude and prevent entry. The first element of our audit, therefore, identifies the park as public yet not an entirely open or free space. It is a *qualified* space, meaning public movement and occupation are limited and constrained. Parks are *highly planned* spaces with boundaries defined by a wall or fence. Within the boundary the landscape is designed or shaped over time to satisfy community welfare and health concerns (we may refer to a park as 'the lungs of a city'), and broader philosophical and aesthetic ideals of nature, beauty, and escape. The planned landscape also provides and guarantees access, and, importantly, manage how people move around and (temporarily) stop and spend time in the park.

As *figure 7* shows, park planning includes benches for stopping and resting, and for contemplation of the surroundings (trees, flowers, birds etc.). Bench design such as those with fixed armrests explicitly prevent repose (lying down), however, thus discouraging rough sleepers from using them. This is one example of how planned spaces, such as parks, are *governed*, *regulated*, and *managed* spaces that make use of *defensive architecture* and *obstacles* to *discipline* those who inhabit them, often using subtle but effective methods. As Naomi Smith and Peter Walters suggest: 'defensive architecture seeks to discipline 'undesirables' by designing against alternative uses [...] with the explicit purpose of excluding from public space those engaged in unsanctioned or undesired behaviours'⁸.

⁷ Ministry of Housing, Communities & Local Government, *Rough Sleeping Strategy*, (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/733421/Rough-Sleeping-Strategy_WEB.pdf> accessed 11 May 2019.

⁸ Naomi Smith and Peter Walters 'Desire Lines and Defensive Architecture in Modern Urban Environments' (2018) 55(13) *Urban Studies*, 2982.

Other than benches, the planned park in *figure 7* has well-tended green spaces around which wrap a uniform network of pathways that lead the walker in a defined and ‘disciplined’ manner. It doesn’t appear to be the case in our present example, but some planned spaces with green space, such as a well-manicured lawn for example, will request walkers stay on the path by asking, often politely, to “please keep off the grass”. This raises a further interesting point about the role of discipline in the governance of public spaces. While the sign politely states “please keep off the grass”, the likelihood of receiving a formal legal sanction or punishment as imprisonment or a fine should you decide to ignore the sign is very unlikely. Instead, the sign relies on extra-legal principles and rules of conduct such as common sense and good manners. The aim, simply, is to ask politely and expect this to be respected.



Figure 7: “welcome” by Laura Billings is licensed under CC BY-NC 2.0

We find many signs in a park, not just ones telling us to keep off the grass, and each plays a role in directing both movement and behaviour. To protect themselves against liability for accidents and claims of negligence, park authorities often deploy signs warning of hazards such as hidden steps or steep slopes. In most cases signs have no legal force, nor are they supposed or intended to. For instance, there is nothing overtly legal about a sign telling you where the public toilets are. Yet, where the toilets are in the park (whether there are toilets at all) and how you are directed to them is part of the planning and has a disciplinary effect. Park planning may deliberately lead people to key points of cultural or economic interest and consumption, including strategically placed sculptures or a café and shop. This form of discipline has no obvious legal character. Instead, the design encourages park users to consume what the park offers, so to speak, to linger in the space for longer, enjoy the opportunity to relax and to do so, preferably, with a drink purchased from the café.

Increasingly parks, especially those in cities, have CCTV to monitor activity, including who comes and goes and at what time of the day (or night). Along with signage, CCTV and other more traditional means of surveillance including park wardens, gardeners or groundskeepers, further reveal that the implied freedom and openness of parks as public space is always qualified. To use or move through the park is to find oneself disciplined into meeting certain agreed standards of behaviour, and increasingly to be watched to ensure that we meet these standards. We should remember that discipline of this sort is not necessarily a bad thing, however. We might argue, for instance, that being part of a community requires a person to accept agreed norms and values of conduct and behaviour. Adherence to a social contract ensures, to a large extent at least, that everyone has an equal opportunity to enjoy the park, and the price of safeguarding this enjoyment is accepting some discipline and surveillance.

I have already described how design steers people through the park in a manner planned for using signs and other disciplinary and defensive architecture such as a pond or lake, fencing or bollards. Formal pathways, such as the tarmacked one’s in *figure 7*, are channels that carry a person either through the park (from an entrance to an exit), or to a defined destination within it, the café for example. They encourage staying on formal pathways, as the “please keep off the grass” signs attest. But park users always try to bend the space to meet their wishes and demands. Discipline, therefore, acts to contain and shape desire between park planners, authorities and users.



Figure 8: Desire Line in Manchester. Image by Robert Herian

The materiality of the pathway plays an important role in encouraging us to use it rather than not. Walking on an asphalt or tarmac pathway is arguably preferable to the mud of an informal pathway or the wet grass. This isn't only a question of a discipline as we have described it so far, therefore, but concerns a whole array of other "civilizing" criteria adopted by societies in which bureaucratic efficiency and maintaining economic viability in all walks of life is the absolute aim. As Tim Ingold says, 'In modern societies, it seems, straightness has come to

epitomize not only rational thought and disputation but also values of civility and moral rectitude'⁹ On Ingold's terms, therefore, the use of informal paths is a means of bending the straightness of rational or bureaucratic thought. Informal paths do *queer* planned space by challenging what we call "traditional" both in terms of property and space, or exclusive terrain¹⁰.

The decision not to use pathways provided but seek alternative (queer) routes brings us back to the subject of desire lines. *Figure 9* illustrates the basic and practical function of a desire line: to enable a journey that is direct. To achieve this goal requires the creation, usually by the erosion of the land under many footsteps, of a pathway that bisects an existing planned route. The direct nature of desire lines means they do most times improve efficiency. In *figures 7 and 9* we see common types of desire line that cut the corners of planned space and provide a more efficient route. If two people were to set off at the same time and at the same speed, one using the formal path, the other the desire line, the person using the desire line would (presumably) arrive first having covered the least distance to get there. It would also save energy for the one who used the desire line because of the marginal gain in distance leading to less effort, therefore, providing greater efficiency.

If we consider a person whose income is based on getting from point A to point B in the shortest time possible, a bicycle courier for instance, then desire lines quickly reveal the economics in their use. Similarly, a person crossing not a busy junction to the shop where they buy their lunch every day may well habitually take a more direct line to get there to maximise the amount of break time they have. This latter example may not result in the formation of a physical line in the landscape, but is the essence of a desire line as pure demand for efficiency.

⁹ Tim Ingold, *Lines: A Brief History* (Routledge 2016) 5.

¹⁰ Margaret Davies, 'Queer Property, Queer Persons: Self-Ownership and Beyond' (1999) 8 *Social and Legal Studies* 330.

So, whilst the lure of the smooth tarmac may be enough to encourage some people to stay on the formal, planned pathway, there are several plausible efficiency gains from choosing the desire line, even if this means suffering some inconvenience (muddy shoes) or discomfort (a bumpy ride on a bike). Desire lines can also carry risk associated with their use, which takes a variety of forms. For example, the terrain that the desire line crosses may be significantly more hazardous than the route of the formal path, this may be because of a steep incline for example, or because it leads to a road crossing away from a formal pedestrian crossing. In both cases the person using the desire line may save time, energy and perhaps even money, but they also risk injury or death.

Some desire lines are longer than others, yet all achieve the same basic goal of conjoining formal routes within planned space. Desire lines are often “straighter” than what they offer an alternative to, and to construe them as a rejection of straightness, as Ingold describes it, is not entirely accurate. What might have first appeared as the queering of space is in fact the opposite: the collective effort of individuals to improve the efficiency of planned space. This makes desire lines channels of *hyper* efficiency, and to use them is an act of demanding greater efficiency from oneself, to self-discipline and self-govern under socioeconomic norms and values.

Roads made using tarmac provide comfortable, safer, and above all more efficient journeys in terms of fuel (energy expenditure) and speed (time, money). We could argue, all movement involves the need to improve (economic) efficiencies. To be complicit in this is not always to recognise oneself as an economic subject shaped for better economic efficiency. This truth escapes many people day-to-day. Instead, we act out unconsciously movements that take us in that same direction, along the same pathways and highways every day.

Looking at the path in *figure 7* we might say that all these efficiency gains we have discussed would be modest. The distance isn't far, and the savings made not all that great. And yet, its well-worn appearance tells us that people continue to use it regularly, almost to where we can say it is now the *de facto* formal path rather than an alternative or detour. As we saw in the earlier section, looking at the transition of informal pathways to formal pathways, we can see that how desire lines end up shaping the planned landscape is not new. Instead, it holds a firm place in planning orthodoxy, especially concerned with demands to increase efficiency. As at Ohio State University, where the transformation of the landscape by desire lines is obvious, and incorporating them into the planned space was the only realistic option. In our park the desire line may eventually be formalized, may become another of the planned routes. Albeit a formal path that memorializes the failure of planning either to predict user behaviour or maintain discipline.

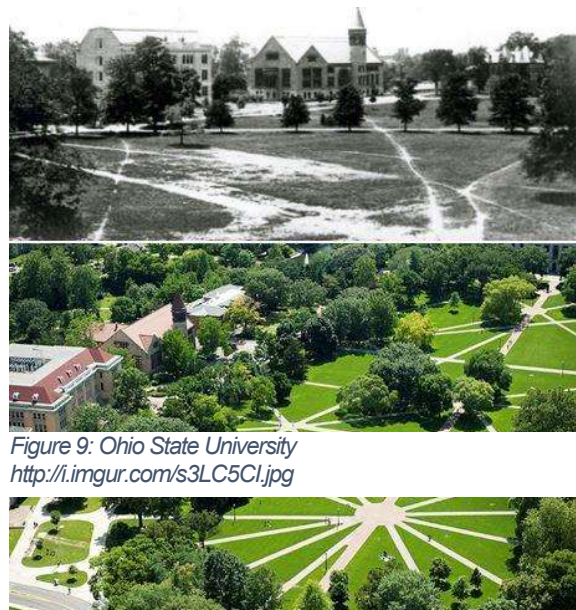


Figure 9: Ohio State University
<http://i.imgur.com/s3LC5Cl.jpg>

4. Two Legal Impressions

The two legal cases that follow describe the law's approach to and interpretation of desire lines and informal pathways predominately in terms of negligence¹¹. There is no need to offer a great deal of commentary around the two cases as the facts speak for themselves, and will reflect upon, I hope, the discussion so far. Significant in both cases is that the informal pathways described intertwine with effects. Both cases offer an intimate glimpse into the relationship, as a point of traumatic recognition, between a path and its user.

If desire lines show a user's commitment to efficiency, a matter that both cases touch on, it can equally be said that in creating and adding to desire lines a user who leaves their mark on the landscape is seeking recognition from others by doing so; a simple statement that "I was here". Recognition is the foundation of Hegel's understanding of desire, as Alexander Kojève explains:

Desire is shown to be distinctively human when it is directed either toward another desire, or to an object which is 'perfectly useless from the biological point of view ... Desire is human only if the one desires, not the body, but the Desire of the other ... that is to say, if he wants to be 'desired' or 'loved', or, rather, 'recognised' in his human value ... In other words, all human, anthropogenetic Desire ... is, finally, a function of the desire for 'recognition'¹².

In the following two cases, recognition is not expressly apparent in using informal paths by the claimants (the injured parties), but comes later in court, from a judge whom claimants hope will award compensation for negligence. Yet this type of recognition remains a desire tied to the recognition of others. It follows the same path.

4.1 Case I: Slopes & Moats – *Taylor v English Heritage*¹³



Figure 10: Carisbrooke Castle. Image by Steve Gascoigne, Available Light Photography

Mr Taylor, in his 60s, was visiting Carisbrooke Castle in the Isle of Wight with his wife and grandchild. He had been on an elevated cannon firing platform. Below the platform was a grass pathway at the base of a steep slope. There was also an informal path down the slope from the platform to the pathway and at the other side, beyond a wall, was a moat. He set off down the informal path but fell across the pathway, over the wall and into the moat suffering a serious head injury. He claimed English Heritage were in breach of their duties under s.2 *Occupiers Liability Act 1957* for failing to take reasonable steps to ensure his safety.

¹¹ For present purposes, *Halsbury's Law of England* describe negligence as a "notional duty to take care" and: a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all.

¹² Alexander Kojève, *Introduction to the Reading of Hegel* (Allan Bloom ed., James H. Nichols, Jr trs., Basic Books 1969) 6.

¹³ [2016] EWCA Civ 448.

In the case the Recorder dealt with a key issue of causation, in which it was stated that: “Being the person that he is, a man who has engaged in *responsible, rational and methodical* activities all his life, I consider it unlikely that Mr Taylor would have stood up on that slope as he went down the informal path if he had known of the existence of the sheer drop. I conclude, on the balance of probabilities, that he did not, and hence that the defendant’s breach of duty in failing to provide adequate warning of the sheer drop was causative of his accident.” [emphasis added]¹⁴

The Recorder also dealt with the matter of contributory negligence: “As the bank is sufficiently steep for there to be a risk of injury, even if the sheer drop had not been there, had any person attempted to negotiate the informal path, or part of it, whilst standing, I consider that there is a considerable degree of contributory negligence in this case. Mr Taylor, even if he was not aware of the sheer drop (as I have found he was not) must have been aware as he stood on the artillery platform and looked down, just how steep the bank was, and, accordingly, the appropriate assessment of contributory negligence is that he was fifty per cent to blame for his accident”¹⁵.

In his case study examining the incident, Mark Daniels concluded that:

‘The steep ‘desire line’ path is a key element in this. If descending by this route, it would be difficult to control the rate of descent, and the overrun at the bottom could easily take a person across the grass pathway and over the edge into the moat. There were other informal and less steep pathways off the bastion, and one solution would be to manage visitor access by making one of these a more obvious route for descent to the grass pathway, and blocking off the steep desire line until grass could regrow. A person making a controlled descent on a gently inclined path would arrive on the grass pathway and have time to appreciate the hazard of the vertical drop into the moat’¹⁶.

4.2 Case II: Louise Byrne’s Ankle - *Byrne v Ardenheath Company Ltd*¹⁷



Figure 11: Mountview Shopping Centre. Source: Google Maps

On 25th February 2016 the Irish Times reported the following story:

A woman has been awarded €75,000 damages at the High Court after she slipped and broke her ankle when crossing a grassy embankment to leave a shopping centre car park. Louise Byrne (48), Parslickstown Avenue, Mulhuddart, Dublin, sued Ardenheath Company and Ardenheath Management

Company, owners and operators of the Mountview Shopping Centre, Blanchardstown, Dublin. The accident happened on December 20th, 2012, after Ms Byrne, an information officer, had parked her car and was crossing the embankment which she claimed was slippery and dangerous¹⁸.

¹⁴ [2016] EWCA Civ 448 41.

¹⁵ [2016] EWCA Civ 448 42.

¹⁶ Mark Daniels, ‘Case Study: English Heritage v Taylor – Court of Appeal’ (25th April 2016) <<https://www.historichouses.org/uploads/assets/uploaded/daddadfe-7375-4868-918108d2cea8a1fb.pdf>> accessed 13 May 2019.

¹⁷ [2017] IECA 293

¹⁸ ‘Court awards woman who broke ankle in fall €75,000’ (*Irish Times*, 25 February 2016) <<https://www.irishtimes.com/news/crime-and-law/courts/high-court/court-awards-woman-who-broke-ankle-in-fall-75-000-1.2548462>> accessed 13 May 2019.

The judge at trial in the High Court stated the following concerning the location of the accident:

The only designated exit, as I have said, in this instance was a shared vehicular entrance. There was a cutaway as one entered or exited the entrance which could physically accommodate pedestrians, I suppose, but it wasn't marked out, it wasn't indicated as such, and there was no way really of saying that pedestrians were to use that or not. A pedestrian, if one were to be very strict about it, would have to wander down past the entrance and carry on to one of the two pedestrian entrances in the other half, as it were, of the car parking area and then carry on up again. Very often, as we know, people don't do that, people will take shortcuts, as is evident from the photographs. People were taking shortcuts all over the place in this area because that's what people do and that's why people have to be given the choice. But were they given an appropriate choice in this case?

When Louise Byrne's case came to Appeal, however, the Court saw the matter very differently, as the Irish Independent reported:

A €75,000 damages award to a woman who slipped and broke her ankle when walking down a wet grassy slope to leave a Dublin shopping centre car park has been overturned by the Court of Appeal (COA). Ms Justice Mary Irvine ruled the companies which own and operate Mountview Shopping Centre, Blanchardstown, Dublin, had not breached their statutory duty to take reasonable care for the safety of Louise Byrne. *A visitor is expected to take reasonable care for their own safety and if they decide to go down a wet grassy slope in unsuitable footwear instead of using a nearby safe tarmac surfaced entrance, "they will take responsibility for the consequences of that decision", she said.* If an occupier had to provide the type of preventative measures suggested by Ms Byrne's engineer to meet "reasonable care" obligations under the Occupiers Liability Act, such as installing a step with barriers either side of the slope, that would have "potentially significant adverse repercussions" for all who occupy land open to visitors, such as local authorities responsible for many "wonderful open spaces and parks"¹⁹. [emphasis added]

4.3 Last Impressions

We make desire lines on land by our movement, migration, and conveyance through space and time. Invariably, they are deviations from prescribed highways or formal paths. But, as the name suggests, they reflect and embody more than geospatial cuts and erosions linked to a need or demand for speed and efficiency. Desire lines are epistemic, ontological, and imaginary phenomena. Perhaps above all, they are psycho-political *imprimaturs*: modes of resistance, acts of defiance, means of escape. Whether desire lines succeed on these terms is hard to judge, however. My instinct is they don't, because we all return to the formal pathway. The shift in perspective of the planned world that momentary glimpse the desire line offers lives only for as long as the (short) cut allows.

A: Are people always concerned with getting to their destination as quickly as possible?

H: Not necessarily. Although you are in principle looking for abbreviations, they do not always choose the shortest link between the starting point and the destination. Sometimes they also make detours.

A: Because they get lost?

¹⁹ Tim Healy, 'Judge Overturns €75k Award to Woman Who Slipped on Grassy Slope Outside Dublin Shopping Centre' (*Independent.ie* 10 November 2017) <<https://www.independent.ie/irish-news/courts/judge-overturns-75k-award-to-woman-who-slipped-on-grassy-slope-outside-dublin-shopping-centre-36308484.html>> (accessed 13 May 2019).

H: No, for a much more interesting reason: trails have to be entertained as normal ways; if used too seldom, they disappear again under grass and scrub. Therefore, it may be useful if people who start in the same place, but want to [sic] different goals, share a part of the way

A: 'This is inevitably at the expense of a group'.

H: 'Surprisingly no. Trampling trails tend to be fair and all have the same relative detour ... This creates amazing mini-shortcuts, as you can see them in parks, where people prefer to walk four steps through the meadow rather than take a slightly longer path'²⁰.

Private, public and criminal laws inform our relationship to the land and environments in which we live, upon which we build and grow, and across or through which we journey, march, wander, and move. Desire lines are manifestations of a heterogeneous and contingent social imaginary at play in these simple acts, translocations, and flows consciously and unconsciously inscribed on the landscapes we inhabit.

In human effort, the only source of energy is desire. It is not in a person's nature to desire what he already has. Desire is a tendency, the start of a movement towards something, towards a point from which one is absent. If, at the very outset, this movement doubles back on itself towards its point of departure, a person turns round and round like a squirrel in a cage or a prisoner in a condemned cell. Constant turning soon produces revulsion²¹.

Discussing the Land Art Movement in the latter half of the 20th Century, Francesco Careri suggests that: '*All this seems like a desire to start all over again from the beginning of the history of the world, to go back to point zero in order to find unitary discipline, in which the art of the Earth was the only means available with which to come to grips with natural space and infinite time*'²² [emphasis added]. Whether users of desire lines consciously appreciate this sense of fundamental being or raw philosophical insight is open to question. I rather fear the economic reason so prevalent in contemporary societies destroys such utopias. Instead, utopias of a different kind and measure are installed, and "unitary discipline" transformed into something bureaucratic and economic. Desire lines today are poetics of longing in bureaucracy, maps of productivity and efficiency, configurations of advancing and overbearing economic motion that no fence can stop.

²⁰ Part of a dialogue between Dr Christian Ankowitsch and Professor Dirk Helbing <<http://www.ankowitsch.de/2010/08/trampelpfade/>> accessed 13 May 2019.

²¹ Simone Weil, 'Prerequisite to Dignity in Labour' in Siân Miles (ed), *An Anthology* (Penguin Classics 2005) 265.

²² Francesco Careri, *Walkscapes: Walking as an Aesthetic Practice* (Culicidae Press 2017) 126.



Figure 12: Avanti! Image by Lucy Atherton

Chapter 7

Matt Howard

Ownership rhetoric and the question of belonging

Abstract

50 years ago, in *Pettitt v Pettitt*, Lord Diplock famously confirmed the emergence of a 'property-owning, particularly a real-property-mortgaged-to-a-building-society-owning, democracy' (824) in post-war Britain. This chapter takes this statement as the departure point for demonstrating how ownership rhetoric and the ideological commitment to private home-ownership has informed decades of development in housing policy. After providing an overview of the approach successive governments have taken to housing policy, which combined to create quite a problematic outlook for the public provision of homes, the chapter turns its attention to the recent case of *Z v Hackney LBC and Anor*. That case exemplifies the difficulties wrought by the public housing environment, compounded as they are by a rights framework which gives little weight to the matter of considerable, but perhaps more nebulous, socio-economic rights. The chapter argues that this presents problems for geographical and political senses of belonging.

1. Introduction

It has been 50 years since *Pettitt v Pettitt*¹ and, more specifically, since Lord Diplock famously confirmed the emergence of a 'property-owning, particularly a real-property-mortgaged-to-a-building-society-owning, democracy' (824) in post-war Britain. Given that this chapter sits in a collection of essays reflecting on '50 years of law', Lord Diplock's statement seems a suitable starting point for reflection. The rhetorical stress placed on ownership will be interrogated with particular consideration given to the effect on senses of belonging. More specifically, what does the rhetorical emphasis on the importance of owning real property as a condition of political participation mean in relation to belonging within a community? Additionally, what effect has the symbolic value of property ownership had on the law within the last 50 years and, correspondingly, what role can and should law play in committing to upholding senses of belonging? The context in which these questions are asked is housing law and policy; hence it was mentioned above that the *phrase* is worth reflecting on, rather than the judgment itself, as it neatly encapsulates shifts in attitudes towards council housing, redefinitions of 'the social', and the increasing individualisation and privatisation of responsibility within this realm.

In other words, this chapter explores the effect the emphasis on the value of property ownership has had on social policy, legal frameworks, and the belonging of people within a political community. In order to do this, section one establishes a brief account of certain developments in housing law and related policy within the last 50 years. Section two builds on this by considering how such developments inevitably traverse questions relating to precarity, necessity, and belonging. Moreover, the current climate of public housing provision means that the discharge of local authority duties to house people often cuts across people's senses of place, familiarity, and home. The rhetorical focus on property ownership, and on the value

¹ *Pettitt v Pettitt* [1970] AC 777.

of aspiring to own, is woven into this issue. Indeed, the division between haves and have-nots in this regard has become much more apparent, with wealth disparity more dramatically symbolised in, and affected by, access to real property. Moreover, it could be argued that insecure relationships to housing are racialised and xenophobic, given that housing precarity is more likely to lead to exposure to other ideologically driven policy initiatives which disproportionately affect BAME and migrant persons within communities.²

As such, housing precarity becomes one means by which exclusions from political communities are demarcated, and law is bound up in this process. Indeed, this chapter demonstrates, in section three, that housing precarity is cemented by other legal provisions and exhibits the distinct lack of importance within the liberal rights paradigm of textured and relational socio-economic conditions for inclusion. In making this argument the focus is on a consideration of *R (Z & Anor) v Hackney LBC and Anor (Z v Hackney and AIHA)*,³ subsequently confirmed in the Court of Appeal, which concerned a mother and her children in need of housing within the London Borough of Hackney and the question of reasonable exceptions to the duty not to discriminate when deciding who can and should be housed. Housing precarity was substantiated in the process by which the material need to be housed was made, in effect, peripheral to the justiciable issues at hand.

With a focus on various provisions of the Equality Act 2010, the central argument for this chapter is that the rights framework that it relies upon can compound the diminished senses of belonging felt by those experiencing housing precarity. As an aspect of this argument, I suggest *Z v Hackney and AIHA* exemplifies the need for a duty to consider socio-economic rights to be introduced and factored into legal decision making, including committing to considering belonging as an important objective of law.⁴ Within the challenging climate for public housing provision, such a duty to recognise and consider socio-economic rights is, it is argued, a very modest but significant step in satisfying both geographical and political senses of belonging.

2. Ideological and legislative backdrop

The story of housing provision, policy, and need is one of fluctuation, tension, and contingency on political and economic pressures.⁵ For instance, the speed and quantity of local authority housing built in the post-war era was also characterised by high-volume tower blocks which were poorly received. As such, council housing was widely disparaged, and the 1970s heralded the unpopularity and negative image of housing provided by the council.⁶ Whilst it is true that the provision of housing could be characterised by problems long before the 1970s, just as the desire for a property owning democracy was extant long before *Pettitt*,⁷ rapid and fundamental changes in relation to housing ideology and policy have occurred within the last 50 years and invite particular attention.

² Sarah Keenan (2018) 'A prison around your ankle and a border in every street: theorising law, space, and the subject' in Philippopoulos-Mihalopoulos, A (ed) *Routledge handbook of law and theory*. Abingdon: Routledge; Smith, D (2019) 'The Immigration Act 2014 and the Right to Rent' in Prabhat, D (ed) *Citizenship in times of turmoil?: theory, practice and policy*. Cheltenham: Edward Elgar.

³ *R (Z & Anor) v Hackney LBC and Anor* [2019] EWHC 139.

⁴ A public sector duty to consider socio-economic rights is provided for in section 1 of the Equality Act 2010. However, successive governments have refused to bring this provision into force, as required by section 216(3).

⁵ David Cowan and Morag McDermont (2006) *Regulating social housing: governing decline*. Abingdon: Cavendish.

⁶ Ibid.

⁷ Ben Jackson (2012) 'Property owning democracy: a short history' in O'Neill, M, and Williamson, T (eds) *Property-owning democracy: Rawls and beyond*. Oxford: Blackwell.

One early milestone was the enactment of the Housing Act 1974.⁸ This provided for Housing Association Grants, financing any gap between the cost of a scheme and the income housing associations received in rental income. This, alongside income grants which were available should a scheme subsequently have a revenue deficit, effectively meant housing associations were state guaranteed.⁹ The effect of Housing Association Grants was the reduction of *direct* public sector participation in the provision of housing,¹⁰ notwithstanding the financial guarantees the scheme provided.

By the late 1970s, identifying owner-occupation as a desirable policy objective had taken hold in the Labour Party¹¹ drawing it into closer convergence with the values held, perhaps less surprisingly, by the Conservative Party.¹² When the Conservatives, led by Margaret Thatcher, came to power in 1979, they brought with them an ideology of reduced state involvement in the provision of social services, the rhetoric of individualised and privatised responsibility, and a conceptualisation of inequality as a necessity for a functioning economy. A commitment to the 're-commodification of housing'¹³ followed. As a result, The Housing Act 1980 provided for the right of secure tenants to acquire the freehold of houses, or long-lease of flats, at an exceptionally discounted rate. The immediate effect of this policy was that it enabled those who were in a position to afford to purchase their council homes to do so. It also left those unable to afford to purchase their homes continuing to pay rent, and rent which no longer needed to satisfy the "no-profit rule" provided by the Housing Rents and Subsidies Act 1975, as this was repealed by the Housing Act 1980; local authorities were effectively then pressurised to increase rents to offset parallel reductions in funding from central government.¹⁴ In other words, the Housing Act 1980 exemplified the inequality necessary to satisfy the commitment to a smaller state and privatisation. Furthermore, the longer-term implication of the right to buy policy was the significant reduction in local authority-controlled housing units.

Moreover, the concern of Thatcher's conservative government with reducing state expenditure on the provision of public services, whether provided directly or indirectly by the state, led to a curtailment of the level of funding made available via the Housing Association Grant. This created an unfavourable environment¹⁵ for many housing associations¹⁶ and demonstrated that, whilst not a 'political football',¹⁷ housing policy was fundamentally affected by the whims of changing governments and ideologies.¹⁸ Because, since 1979, the ideology of a radically smaller state has guided successive governments into a particular direction of travel and a general consensus over housing policy,¹⁹ we can look back on the Housing Association Grant

⁸ Peter Malpass (2000), *Housing Associations and housing policy: a historical perspective*. Basingstoke: Macmillan.

⁹ David Cowan (2011) *Housing law and policy*. Cambridge: Cambridge University Press.

¹⁰ Nick Gallent (1998) 'Local housing agencies in rural Wales' 13(1) *Housing studies* 59.

¹¹ Anne Power (1993) *Hovels to highrise: state housing in Europe since 1950*. London: Routledge.

¹² The 1970s also heralded a growing consensus about the approach that needed to be taken in relation to housing policy, and a desire held by both Labour and Conservatives to diversify housing provision away from reliance on local authorities (Malpass 2000).

¹³ Ray Hudson (2013) 'Thatcherism and its geographical legacies: the new map of socio-spatial inequality in the Divided Kingdom' 179(4) *The geographical journal* 377, 379.

¹⁴ See Elizabeth Roistacher (1984) 'A tale of two conservatives: housing policy under Reagan and Thatcher' 50(4) *Journal of the American planning association* 485.

¹⁵ An environment which, in subsequent years, would become incrementally more unfavourable (Jacqueline Smith and Michael Oxley (1997) 'Housing investment and social housing: European comparisons' 12(4) *Housing studies* 489; Michael Oxley (1999) 'Institutional structure of social housing finance in the UK: recent developments' 36(4) *Urban studies* 673).

¹⁶ Gallent (n 10).

¹⁷ Malpass (n 8), 157 et seq.

¹⁸ Though, arguably, Labour and Conservative were not, historically, dogmatic about ideologies and attitudes to government and avoided extreme shifts from an albeit fairly value laden idea of 'traditional orthodoxy and market forces' (see eg Ian Gilmour (1992) *Dancing with dogma: Britain under Thatcherism*. London: Simon & Schuster, 9).

¹⁹ Morag McDermont (2010) *Governing independence and expertise: the business of housing associations*. Oxford: Hart.

and the practical effects it had on the provision of housing with renewed understanding of its significance. In other words, the function of the Housing Association Grant was to ensure that local authorities were encouraged to rely upon housing associations for the provision of social housing. Following the election of a government determined to cut public expenditure on the provision of social service in 1979, the Housing Association Grant also functioned to put housing associations in the firing line.

2.1 1979 and beyond

While the section above demonstrates a convergence of approaches between the two main parties in the 1970s in relation to housing, and touches upon the effects of the Housing Act 1980, this section's distinction between pre-1979 and post-1979 is made on the basis of a sharp ideological difference between these political eras. From 1979, there has been an accelerated effort to reduce public expenditure, encourage private investment in the provision of public services, and the exposure of public service providers to market risk.²⁰ Alongside this, there was a significant shift in rhetoric surrounding the expectations citizens could, and should, have of the provision of public services; a change in how 'good' citizenry was characterised; a mobilisation of rhetoric suggesting public services were a contributory factor to social ills;²¹ and a desire to limittical strength and opposition at local government level. Each of these features of a particular ideology, in one way or another, has contributed to the housing context in which this chapter's analysis of *Z v Hackney and AIHA* sits. The Housing Acts of 1980, 1988, and 1996, and the Housing and Planning Act 2016 each contribute to the story of tenant acquisition of council housing, transfers of social housing stock from local authorities to housing associations, and compelling housing associations to seek private finance, thus exposing them to increased risk while also providing for a greater ability to acquire council housing stock.

In the short-term, the immediate impact of the Housing Act 1980 was that it ensured that the majority of tenants in council houses had a right to buy their homes. This provision was reinforced by ministerial pressure being put on local authorities who refused to cooperate with the statutory right to buy;²² before this point, the right of tenants to buy their council properties had been something that councils could freely disregard. The result was an extraordinary acceleration of the sale of council housing. Between 1980 and 1985, 643,000 homes were sold, tripling the sales of council housing that had occurred throughout the 1950s, 1960s, and 1970s combined.²³ While popular, 'ideology obstructed common sense'²⁴ and the combination of the right to buy with the ideological commitment to market reliance for the provision of public services, alongside reducing the capacity and powers of local authorities, prevented any reinvestment of the proceeds of right-to-buy sales in the building of more council housing stock.

As such, the percentage of housing provided by local authorities fell from 32 percent in 1979 to less than 25 percent within less than 10 years.²⁵ Indeed, in the longer term, owner occupation rose considerably, and local authority housing provision in Great Britain has now fallen to just over a quarter of what it was in 1981.²⁶ While conservative authors might identify this as significant statistical support for the argument that the right to buy policy is a success,²⁷ it undeniably contributed to the weakening of the capacity of local authorities to respond to

²⁰ See eg David Harvey (2005) *A brief history of neoliberalism*. Oxford: Oxford University Press.

²¹ Paul Garrett (2015) 'Words matter: deconstructing "welfare dependency" in the UK' 3(3) *Critical and radical social work* 389.

²² Gilmour (n 18).

²³ David Mullins and Alan Murie (2006) *Housing policy in the UK*. Basingstoke: Palgrave Macmillan, 95.

²⁴ Gilmour (n 18), 144.

²⁵ Malpass (n 8).

²⁶ Mark Stephens et al (2019) *UK housing review*. Coventry: Chartered Institute of Housing.

²⁷ Peter King (2010) *Housing policy transformed: the right to buy and the desire to own*. Bristol: Policy Press.

housing needs. Perhaps more significant, particularly in relation to the later focus of this chapter, is the substantial rise in the proportion of housing association dwellings in Great Britain; there are over four and a half times more now than there were in 1981.²⁸ This rise is a result of steady increases in property acquisition and building across the last 40 years. Within that time, there have been a number of key policies and legislative enactments that have needed to be responded to. The most significant of these are the provision for stock transfers and the Housing Act 1988.

The Housing Act 1988 is perhaps the piece of legislation which best symbolises the Thatcher government's approach to housing. This chapter has already touched upon the reduction in direct local authority provision of housing in favour of housing association provision, in response to the Housing Act 1974 and the benefits of the government grants that could be awarded to encourage housing association development. However, the expansion of housing associations in the 1980s was also matched by an increased anxiety among housing associations that the regime of Housing Association Grants to fund the costs of housing association builds 'could not survive the assaults on public spending of the Thatcher administration. [Indeed], during the mid-1980s, associations and the Housing Corporation could see that public funding to associations would not continue at the level they had become used to'.²⁹ The 1988 Housing Act was the legislative realisation of these concerns. It introduced the need for housing associations to shoulder the risk of more autonomy and more exposure to private finance and the housing market as opposed to being guaranteed by state support (Bramley 1993).³⁰

The effect of this shift in emphasis was that housing associations were not constrained by public finance spending rules; a larger proportion of their funding now came from private investment. This meant housing associations were less restricted in terms of spending power, meaning that more money could be spent on acquiring housing stock. This accelerated Large-Scale Voluntary Transfers, the means by which local authorities could divest themselves of council housing stock, with some divesting themselves of nearly all, or sometimes all, of their stock. Moreover, the Housing Act 1996 provided for an additional diversity of bodies—including companies which were not registered societies or charities³¹—who were eligible to register as social landlords and access Social Housing Grants (replacing Housing Association Grants). In relation to non-local authority sources of housing, the 1988 Act set in motion fewer constraints on how housing associations managed dwellings within their portfolios, including enabling the sale, lease, or shared-ownership sale of dwellings. This continued under the 1996 Act, demonstrating that the new funding environment for housing associations was also coupled with a continued commitment to basing housing policy on the core value of homeownership, or at least simulations thereof.³²

Within such a public housing context—emphasising as it does the importance of diversification of housing providers, the diminishing stock of local authority housing, and the emphasis on enabling social housing tenants to eventually own their own homes³³—it is important to stress the impact this inevitably has on a local authority's ability to adequately and directly discharge any obligations to accommodate. The local authority's duty to accommodate is provided for in

²⁸ Stephens et al (n 26).

²⁹ Cowan and McDermont (n 5), 91. See also McDermont (n 19).

³⁰ Glen Bramley (1993) 'Quasi-markets and social housing' in Le Grand, J, and Bartlett, W (eds) *Quasi-markets and social policy*. Basingstoke: Macmillan.

³¹ They still needed to satisfy a non-profit making criterion in order to be eligible for registration, a condition which was removed by the last Labour government via s.115 of the Housing and Regeneration Act 2008.

³² While not the focus of this chapter, it is important to emphasise the implications of the 1988 Act for rent controls and affordability: the increased risk placed on housing associations, and the increased autonomy they enjoyed was also coupled with the fact that new tenancies granted by providers of social housing would be free from statutory control over rents being charged.

³³ Compounded by the extension of the right to buy to social landlords provided for by the Housing and Planning Act 2016.

the Housing Act 1996, as amended, as being discharged through nominations of persons to be assured tenants to accommodation held by private registered providers of social housing or registered social landlords.³⁴ Such nominations must be made on the basis of local authority allocation schemes which outline how priorities are defined and the process by which accommodation is allocated.³⁵ However, the local authority management of allocations, and the discretion local authorities possess in the course of making allocations,³⁶ have been hampered by the continual depletion of available housing during the last 40 years. Moreover, local authorities have little access to resources, financial or otherwise, to replenish stock and are compelled to sell off additional stock to fund the widening of the right to buy for housing association tenants.³⁷

3. Housing and precarity

Within this legislative and policy context, a key question to reflect on is: what does this legal context mean for people? The above plotting of housing legislation milestones within the last 50 years confirms that the focus of post-1979 governments was to diminish the role of local authorities in relation to housing as much as possible. Such an aim originates from the same place as the value placed on homeownership. Indeed, Thatcher's 'program of politico-ideological war against . . . general notions of social democracy and corporatist or civic belonging', continued by successive governments, 'drove her to transform the world into a place where . . . "there is no society, only individuals"'.³⁸ The policy shift from society to individuals can readily be brought back to the idea of the privatisation of responsibility, where homeownership is rhetorically framed as an economic necessity and a source of security, and where non-ownership is cast into the rhetorical framing of responsibility for overcoming need and securing provision as being one's own.

Law is a means through which to achieve this; the manifestation of, for instance, the statutory right to buy satisfies a yearning to promote ownership and also becomes the basis on which non-owners are exteriorised. The legislative provision of the right to buy, and the unequivocal value placed on ownership as '*the goal of UK housing policy*',³⁹ can be pointed to as the methods by which the 'good' homeownership can be extended to others. In parallel, it contributes to the mobilisation of an equivalent suggestion that the precarity people experience as non-owners is just deserts for not conforming to the self-reliance ostensibly enabled by ownership. This resonates with the common refrain of neoliberal governments that dependency on welfare and other public services designed to relieve poverty have the effect of maintaining it.⁴⁰ In other words, housing policy both reasserts a supposed 'psychological and social superiority of homeownership'⁴¹ and rationalises the abdication of state responsibility for housing provision in moralistic rhetoric about the ills of reliance on public services.

None of the above disregards the fact that the rhetorical stress on homeownership has also led to an increased sense of precarity and anxiety among homeowners, too. Indeed, the

³⁴ s.159.

³⁵ s.166A.

³⁶ See Emma Laurie (2011) 'Filling the accountability gap in housing allocations decision making' 31(3) *Legal studies* 442.

³⁷ Chris Bevan and Emma Laurie (2017) 'The housing and planning act 2016: rewarding the aspiration of homeownership?' 80(4) *Modern law review* 661.

³⁸ Anthony Marcus (2006) *Where have all the homeless gone?: the making and unmaking of a crisis*. Oxford: Berghahn Books, 140.

³⁹ David Cowan, Helen Carr, and Alison Wallace (2018) *Ownership, narrative, things*. Basingstoke: Palgrave Macmillan, 8.

⁴⁰ See eg Kesia Reeve (2015) 'Criminalising the poor: squatting, homelessness and social welfare' in Fox O'Mahony, L, O'Mahony, D, and Hickey, R (eds) *Moral rhetoric and the criminalisation of squatting: vulnerable Demons?* Abingdon: Routledge.

⁴¹ David Madden and Peter Marcuse (2016) *In defense of housing*. London: Verso, 41.

promotion and promise of property ownership often translates to the reality of debt secured against property and consequential financial precarity, with the rhetoric of personal responsibility personified by the practice of high personal risk. In other words, 'ownership is no guarantee of stability . . . [but] a route to catastrophe'.⁴² This potential is encapsulated in Lord Diplock's significant caveat of not just a property-owning democracy but a 'real-property-mortgaged-to-a-building-society-owning democracy'.⁴³ Moreover, the emphasis on diminishing the state provision of housing, encapsulated in the 'right to buy' policy and in stock transfers of council housing to housing associations, creates a complex picture for those in blocks of flats as their desire to own their own local authority home may be bound by contingency and precarity as their status is as leaseholders rather than freeholders.⁴⁴

Notwithstanding this, there is a particular insecurity experienced by non-owners,⁴⁵ and it is an insecurity brought on by the rhetorical insistence on ownership which draws privatisation into line with civic virtue and citizenship.⁴⁶ The significant changes to the housing market and policy relating to public housing provision invite us to think through questions of precarity and belonging, particularly given the subject matter of *Z v Hackney and AIHA* discussed in the following section. We have seen that the stress on ownership as the ideal way in which people relate to their homes and communities has created an overriding focus on housing and economic policies which encourage homeownership⁴⁷ while also diminishing the effectiveness and availability of affordable social housing options. This has, ultimately, been compounded by the deregulation of the private rental sector.⁴⁸ The stress on ownership, then, precipitates a stress on people who are unable to own and are, thus, left either facing a private rental sector which is 'liberalised' from various forms of tenant protection or navigating social housing options which have gone through an accelerated period of decoupling from direct and democratic local authority control.

3.1 Home, place, and belonging

The stress identified above in relation to housing need is an aspect of ontological insecurity,⁴⁹ in which feelings of safety, of degrees of isolation or alienation, and of financial security are entangled with the housing market and gradations of housing tenure. In other words, security is rooted in suitable housing, while housing inadequacy and/or inaccessibility precipitates insecurity. Given that shelter, and security thereof, is a basic need, and that the sustained ideological shift in housing which casts ownership as responsible and an indication of good citizenship, this idea of insecurity can be encapsulated in Hannah Arendt's idea that 'necessity is primarily a prepolitical phenomenon',⁵⁰ where matters relating to the maintenance of life come before the capacity for political participation. Of course, as has been addressed above, homeownership does not immediately and automatically correspond to security. However, the commitment to the privatisation and individualisation of responsibility in relation to housing has been at the expense of those unable to own, and especially those in need of state support.

⁴² *Id.*, 77.

⁴³ Although, of course, it is now more accurately 'mortgaged-to-a-bank' because most building societies have demutualised.

⁴⁴ See Helen Carr (2011) 'The right to buy, the leaseholder, and the impoverishment of ownership' 38(4) *Journal of law and society* 519. See also Cowan, Carr, and Wallace (n 39) for an indication of how an illusion of 'ownership' can also elide the complexity and potential insecurity of shared ownership as a housing option.

⁴⁵ Indeed, the principle underlined in *Pettitt* is that, short of establishing intentions to the contrary, non-proprietors within the family home can find it difficult to establish a beneficial interest in the property, notwithstanding contributions they may have made. As such, even in the idealised context of the privately-owned family home, the precarity of non-ownership is also evident.

⁴⁶ Lennart Lundqvist (1998) 'Property owning and democracy—do the twain ever meet?' 13(2) *Housing studies* 217.

⁴⁷ Madden and Marcuse (n 41).

⁴⁸ Mullins and Murie (n 23).

⁴⁹ See Madden and Marcuse (n 41).

⁵⁰ Hannah Arendt (1998) *The human condition*. London: University of Chicago Press, 31.

Arendt's idea resonates here not only because it suggests that a preoccupation with need is politically incapacitating, but one could also say it unintentionally and ironically captures the moralistic notion, which has been established as central to the neoliberal ideology, that those in need are political pariahs, too.

While Arendt's understanding of necessity limiting political capability and the capacity to participate within public life is primarily exemplified by political organisation in Ancient Greece, the tenor of this idea is equally applicable to contemporary questions relating to the entanglement of socio-economic status, material need, and political consciousness in Britain. In other words, while her consideration of political freedom afforded to those who liberated themselves from necessity by ruling over slaves is not wholly relevant, the idea of the tension between need and political freedom is. Moreover, expressly in relation to the home, Arendt contends that, 'without owning a house, a man could not participate in the affairs of the world because he had no location in which it was properly his own';⁵¹ it could be argued that not much has changed. Such a point about the importance of rootedness and a sense of place for political inclusion is echoed by Louise Du Toit, who argues that 'home, belonging, having a sense of identity, is a prerequisite for participation (speaking and being heard) and for occupying a place in the public-political domain'.⁵² The importance of establishing 'home' for realising a sense of self is far more substantive than the importance of shelter. It includes what is encapsulated in 'home'—boundedness, security, and 'access to a time that accommodates a rhythm for one's becoming'⁵³—is still *necessary*.

If home is a prepolitical necessity, then the limitation of conditions in which the home is accessible, are limitations of inclusion within the political realm which are reinforced by law. Such a limitation also emerges in the narrative distinction made between private and public housing where, for instance, there is an emphasis on private *home*ownership and the less emotive language to describe other tenures.⁵⁴ In the context of necessity as a prepolitical phenomenon, the liberal rights and equalities framework is insufficient to tackle the social and political imperative of attachments and belongings. Furthermore, the neoliberal acceleration of liberal individualism (ie individualisation of responsibility and associated moralisation about failures to take responsibility so defined) means that the rights, freedoms, and equalities deemed important for access to political security are conditioned by, and subsequently entrench, an overarching liberal paradigm.

Indeed, the very notion of a property-owning democracy commits us to imagining political engagement being conditional on responsible private ownership. The story of housing law being the commitment to offering the 'right to buy' elides the importance of a 'right' to be(-long and -come). The following sections give an indication of where the direction of travel in housing law and policy traverses a rights framework which is not textured, responsive, or appreciative of relationality.⁵⁵ They seek to, first, demonstrate this intersection through a consideration of *Z v Hackney and AIHA*. Second, the capacity for a modest move towards incorporating more location- and belonging-responsive considerations into housing policy and judgments is reflected upon, whereby access to the public-political domain is not contingent on narrow

⁵¹ *Id.*, 29-30.

⁵² Louise Du Toit (2007) 'Feminism and the ethics of reconciliation' in Veitch, S (ed) *Law and the Politics of Reconciliation*. Aldershot: Ashgate, 211.

⁵³ *Ibid.*

⁵⁴ Craig Gurney (1999) 'Pride and prejudice: discourses of normalisation in public and private accounts of home ownership' 14(2) *Housing studies* 163.

⁵⁵ Bal Sokhi-Bulley (2019) 'Rights as a distraction from "belonging": a response to the Shamima Begum ruling'. 28 May 2019. *Critical Legal Thinking*. <http://criticallegalthinking.com/2019/05/28/rights-as-a-distraction-from-belonging-a-response-to-the-shamima-begum-ruling/>. Accessed 28 February 2020. Sokhi-Bulley writes, here, in response to questions of citizenship, rights, and belonging surrounding the revocation of Shamima Begum's British citizenship. However, this work critiques the limiting and limited nature of rights, and invites us to consider an ethic of more substantive 'rights' as a condition of belonging and response-ability.

definitions of 'home' but is brought into conversation with the right to 'home' and the right to belong.

4. Z, competing needs, and the question of equality

In the first section of this chapter, a brief overview of the policy and legislative context surrounding housing law was given. This section now turns to demonstrating how various policy objectives and implementations have manifested themselves in relation to local authority housing obligations. The case of *Z v Hackney and AIHA*⁵⁶ offers a good example of the accumulated effect of housing policy over the last few decades, in that the contribution of Hackney London Borough Council to this case is determined by the reliance on housing association provision, by the reduction of local authority controlled housing stock, and by the continual lack of (re)investment of funds in council housing stock since the 1980s. This case also epitomises how developments in housing policy have led to a change in people's access to senses of place and belonging within a local community. Furthermore, it is argued that this case exemplifies the importance of establishing a rights paradigm which incorporates socio-economic rights in the pursuit of preserving the rights of people to belong.

This case concerns the housing needs of a mother (Z) and her four children. In 2017, Hackney LBC was ordered to house Z and her children in a property in a safe and risk-free environment, taking into account her specific housing needs relating to her two sons' autism. Indeed, the judgment of Lord Justice Lindblom and Sir Kenneth Parker acknowledge that an appropriate property, in response to Z's children's needs, would be defined by the satisfaction of a number of material criteria, including separate bedrooms for the children, single-level ground floor accommodation with an enclosed outdoor space, and access to reserved parking. Moreover, appropriateness was also defined in relation to proximity to the vital familial support offered by Z's mother who lived locally.⁵⁷ Additionally, Z's familiarity with the area, having lived in Stamford Hill her whole life, means that the need for appropriate housing to support her family dovetailed with her sense of being at home in the local community.

The issue at hand in this case arose from the fact that all properties suitable for Z and her family within Stamford Hill were owned by Agudas Israel Housing Association (AIHA). Established in 1981, the AIHA is a housing association whose principal objective is to provide affordable housing for the Orthodox Jewish community. Moreover, the nature and location of the accommodation provided for by AIHA responds to the religious and community requirements of observant Haredim which cannot satisfactorily be met through other housing provision. The focus of AIHA provision in the Stamford Hill area of Hackney corresponds with the large Hasidic Haredi Jewish community in the area. Z and her family are not Haredi Jews and, as such, Hackney LBC did not nominate Z for allocation to any of the six AIHA properties which fitted Z's criteria. The decision in *Z v Hackney and AIHA* had to contend, therefore, with both the needs of Z and her family as well as the community imperative of Haredi Jews.

The judgment considered 'the commitment and need of members of the Orthodox Jewish community to remain geographically proximate to that community, even if that means foregoing improved living conditions, bigger houses, or proper housing at all' and that 'the attachment to specific locations is not a question of convenience but effectively reflective of a way of life and community.'⁵⁸ As such, the strength of place and community belonging necessitates the provision of social housing to mitigate the social disadvantages faced by those in the Orthodox Jewish community. While this is understandable, it is also

⁵⁶ This chapter primarily examines the Divisional Court case and decision, as the Court of Appeal confirms the judgment (with expansion on the related question of proportionality). As such, paragraph references in the following text relate to the Divisional Court judgment unless otherwise stated.

⁵⁷ See [38].

⁵⁸ From Micah Gold, in reference to a focus group representing various Jewish communities in response to a report on the housing needs of the Jewish population in London. Quoted at [34].

understandable that Z and her family felt equally strong familial, social, and practical ties with Stamford Hill and they too had profound material needs in relation to housing. On the one hand, material need is elicited by the strength of community attachment and, on the other hand, community attachment is contingent on material need, such is the manifold texture of the relationship of home and belonging.

The legislative and policy context runs through this case and, indeed, the judgment itself confirms that 'social housing is under severe pressure in Hackney, as elsewhere in the country. There has been a rise in the private sector, a decline in owner occupation, increasing demand for social housing as well as dramatic cuts in central government funding'.⁵⁹ The fact that this rueful passage precedes, obviously, the judgment in favour of one of two parties encapsulates the precarity of non-homeowners. The ideological commitment to the privatisation of housing, and the corresponding limitations on appropriate levels of council housing, lead to indeterminacy in relation to the local authority, too. The social housing environments find local authorities in positions where they must rely upon registered social landlords when discharging their housing obligations⁶⁰ with 'no legal right or power, even if [they] were so minded, to insist that [a registered social landlord] jettison its lawful arrangements and to make allocation decisions without regard to those arrangements'.⁶¹ The uncertainty faced by concerned parties within the context of housing allocation is perfectly exhibited in *Z v Hackney and AIHA*, where the determinations on questions of housing need, and of the lawfulness of the conduct of a registered social landlord, are deferred to the realm of the Equality Act 2010.

4.1 The matter of discrimination

Perhaps the most widely understood aspect of the Equality Act 2010 is the consolidation of numerous pieces of anti-discrimination law, revolving around protected characteristics. Alongside, for example, age, race, sex, and sexual orientation, section 4 of the Equality Act 2010 provides that religion and belief are to be considered protected characteristics. Following this outline the Equality Act 2010 establishes how and when discrimination based on protected characteristics is unlawful; section 13 of the Equality Act 2010 defines discrimination as any instance where, 'because of a protected characteristic, A treats B less favourably than A treats or would treat others.' Importantly, in the context of *Z v Hackney and AIHA*, this also captures favourable treatment of parties because of their protected characteristic(s). As such, the argument presented by Z's counsel was that AIHA had discriminated against Z and her family on the basis that they were not members of the Haredi community.

Furthermore, section 29 of the Equality Act 2010 provides that anyone 'concerned with the provision of a service to the public or a section of the public . . . must not discriminate [on the basis of protected characteristics] against a person requiring the service by not providing the person with the service.' As the local authority responsible for managing housing allocations for those eligible for assistance, under a scheme which relies upon agreements with registered social landlords in order for it to make nominations to them in lieu of its own properties, Hackney was providing a service within the meaning of the Equality Act 2010. As such, its unwillingness to nominate Z for a suitable AIHA property was argued by Z's counsel to contravene section 29, as was AIHA's positive discrimination in favour of the Orthodox Jewish community as an organisation exercising a public function.

The counterarguments of Hackney and AIHA depended upon exceptions included in the Equality Act 2010 which have the effect of rendering some discrimination lawful. Section 158(2) provides that the Equality Act 2010 does not prohibit a person or organisation from

⁵⁹ See [19].

⁶⁰ Provided for by s.159(c) Housing Act 1996.

⁶¹ Quoted at [114].

taking action which seeks to overcome or minimise a disadvantage connected to protected characteristics. Moreover, section 193 of the Equality Act 2010 provides that, so long as restricting benefits to persons who share a protected characteristic is a proportionate means of achieving a legitimate aim, then a charity is not in contravention of the Act. As such, AIHA argued both that the positive action they were taking in relation to the provision of housing was necessary in relation to the disadvantages faced by members of the Orthodox Jewish community, and that, as a charity, AIHA's principal purpose to provide housing for Orthodox Jews was, in any case, permissible under section 193.

The Divisional Court agreed with AIHA, deciding that they were not in contravention of the Equality Act 2010 and, because their policy was determined to be lawful, neither were Hackney as they could not compel a co-operating housing association to dismiss their own lawful arrangements. The Court acknowledged the substantial challenges faced by members of the Orthodox Jewish community both in the observance of their faith, and also in relation to antisemitic violence and the very real senses of unbelonging felt by Orthodox Jews when living within mixed communities.⁶² As such, the preferential treatment of a group on the basis of a protected characteristic under the Equality Act 2010 was not a sufficient ground for Z to seek a review of the housing decision concerning her and her children. This was confirmed by the Court of Appeal. Notwithstanding an outstanding appeal to the Supreme Court, this case raises a number of points relating to the context in which housing decisions are made, the extent to which certain rights are protected over others, and questions about the importance of community and placeness bound up in a speculative right to belong.

4.2 Extending the rights landscape

The preceding text, journeying through various legislative milestones, was an essential part of setting a particular scene. Similarly, the use of *Z v Hackney and AIHA* has exemplified the tensions which can arise when vulnerable people have to navigate a housing system characterised by the distribution of responsibilities to housing associations which might each have their own distinct pressures and purposes that conflict with the needs of those who require accommodation. Each of the sections above is effectively preamble to a wish which is unlikely to come true anytime soon: that wider questions of socio-economic rights are more vigorously bound up in decisions relating to, among other things, housing.

The question for this section is, however, not *necessarily* what effect any enactment of the duty to have regard to socio-economic inequalities would have on a decision such as *Z v Hackney and AIHA*. Rather, it is to establish how questions relating to belonging, geographical attachment, and familiarity would feature in various decision-making processes relating to the provision of services, while also underlining the fundamental problems with the public housing climate. In other words, this chapter does not suggest that the enactment of section 1 of the Equality Act 2010 would have led to a successful claim for judicial review in *Z v Hackney and AIHA*. Indeed, such a decision, grounded in the legislative and principled imperative to act positively to alleviate disadvantages faced by certain groups, is sound. However, a public duty to give due regard to reducing socio-economic disadvantage would mean that a local authority's approach to, for instance, housing would be justiciable.

Scotland, as the only nation within the United Kingdom to have introduced such a public sector duty,⁶³ gives an example of how the duty to give due regard to reducing socio-economic disadvantage can be defined. Guidance produced in advance of the April 2018 introduction of the duty obligates public bodies to 'actively consider, at an appropriate level, what more they can do to reduce the inequalities of outcome, caused by socio-economic disadvantage, in any

⁶² See [33].

⁶³ The Welsh Government have recently (in January 2020) closed a consultation on how to deliver a socio-economic duty in relation to Wales.

strategic decision-making or policy development context'.⁶⁴ While there is, of course, every possibility that such phrasing leaves scope to think of such duty as an empty gesture, the commitment both to assessing policy proposals for socio-economic impact and the broadness of the definition of socio-economic disadvantage to include various community and locality considerations is worth reflecting on.

Indeed, in relation to the planning and provision of housing, the case study modelled by the Scottish Government guidance incorporates the importance of addressing the location of housing in addition to volume, and explains that consideration of adequate access to public services is a vital part of community creation. As such, it demonstrates an understanding of the link between community, locatedness, and socio-economic need. Given that *Z v Hackney and AIHA* turns on competing needs and senses of home within a community, this is an important point to reflect upon. This contest was resolved on the basis that the court accepted that the socio-economic disadvantages and requirements (such as the importance of close community), alongside the antisemitic abuse faced by Haredim, tied to a protected characteristic was sufficient justification for the positive discriminatory policy of AIHA to only offer accommodation to Orthodox Jews.

Of interest here is the submission on behalf of Z that, while many members of the Orthodox Jewish community have acute housing needs (which, ultimately, led to the court determining that AIHA's policy was permitted by s.158(2) of the Equality Act 2010), 'members of the Orthodox Jewish community did not suffer any relevant disadvantage, or have any relevant need, that was not also shared generally by applicants for social housing in Hackney'.⁶⁵ Indeed, it was additionally pointed out that other applicants to Hackney's allocation scheme may have needs which surpassed these of the Orthodox Jewish community. As such, the question which can be asked is whether, in a world where s.1 of the Equality Act 2010 was enacted, the questions related to socio-economic disadvantage, need, and importance of community, would be justiciable issues in their own right and not only in relation to protected characteristics? If so, against whom?

As mentioned above, this case introduced competing entanglements of material need, on the one hand, and questions of home, belonging, and community attachment, on the other hand. As such, it is insufficient to suggest that the material need of one party outweighed the material need to which the other party was responding to in its discriminating policy. Use of s.1 would circumvent questions relating to s.13, and the need to determine whether or not a co-operating housing association had a justifiable exception to the law, enabling it to discriminate on the basis of a protected characteristic. Rather, at issue would be Hackney's strategic approach to housing. For instance, the stress on a definition of socio-economic disadvantage which includes lack of access to basic goods and services, as well as notions of social exclusion, corresponds with the compound necessity of 'belonging' as a socio-economic right introduced above in the consideration of Arendt and Du Toit and in the indications given by the *Fairer Scotland Duty* guidance.

Of course, one hindrance to any would-be enactment of a socio-economic duty which took in the importance of locatedness and access to services is a housing environment characterised over the last forty years by diminishment of local authority housing stock and by the sustained socio-economic and housing pressures being faced by people requiring support of public services. Indeed, in relation to Hackney, the position is stark:

About 13,000 households are currently registered under Hackney's scheme for the allocation of social housing. In 2016, Hackney allocated only 1,229 properties for social

⁶⁴ Scottish Government (2018) The fairer Scotland duty. 27 March 2018. <https://www.gov.scot/publications/fairer-scotland-duty-interim-guidance-public-bodies/>. Accessed 18 February 2020, 17.

⁶⁵ Quoted at [60].

housing. Again, there is no evidence that the imbalance is likely to decrease markedly in the foreseeable future.⁶⁶

It would also be impossible to expect that a commitment to a socio-economic duty would comprehensively and adequately tackle the ideological incursion into social housing which encourages (simulations of) private homeownership and motivates chronic underfunding. However, within this context, and within the context of reliance on co-operating housing associations for service provision, it seems important to ascertain what effects a justiciable socio-economic duty *could* have on housing and planning. In order to do so, we can take Hackney, and the situation in *Z v Hackney and AIHA*, as an example.

It is important to note that Stamford Hill is a large district of Hackney and, as has already been mentioned, all properties which would have been suitable for Z and her family within the area were managed by AIHA. Moreover, in the years relevant to *Z v Hackney and AIHA*, AIHA let 50% of all four-bedroom properties across the borough of Hackney. In light of any potential enactment of a duty to ‘when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage,’⁶⁷ a lack of strategy to establish a diversity of stock from providers whose charitable function is to provide for particular groups within a local community could be challenged. Of course, this would only result in a very modest adjustment to housing outcomes and, given the decades of radical shifts in the capacities of local authorities in relation to housing, would be unlikely to result in sharp enhancements in allocations. However, it would gesture towards factoring in the importance of community attachment and social location—the right to belong—more generally, and not just within the confines of establishing legitimate exceptions for those with protected characteristics under the Equality Act 2010.

5. Conclusion

It is impossible to offer an adequate summary of nearly 50 years of housing law bound up in significant changes in policy and attitude. What the above account of changes does is to develop a story of the challenging housing climate, and the severely reduced capacity for local authorities to provide housing to those in need of public support. This account reflects on how much the ideological insistences about privatising and individualising responsibility, and the preoccupation with ownership, are weaved into this legislation. One consequence of both the ideological emphasis on ownership and the increasingly limited capacity of local authorities to satisfy the continued (and, in many cases, growing) demand to support accommodation for those in need is displacement. In relation to the former, this displacement is from the approved political and rhetorical community, and this community is buttressed by legislative enactments. The displacement experienced in relation to the latter is socio-geographical; as demand for housing outweighs available homes, people are prohibited from locations to which they are tied, by family, friends, support, and indefinable senses of attachment. Both displacements are demonstrated in *Z v Hackney and AIHA*. The case turned on the lack of appropriate housing for Z and her family, who are not Haredim, and the contested practice of a co-operating housing association to primarily provide housing only to Haredim.

The resulting decision in favour of Hackney and AIHA meant, of course, that Z was not accommodated in an AIHA home in her local area or near her familial support network. Furthermore, the decision rested on the consideration of a rights framework which does not—yet, or may never—provide for a duty to consider substantial issues of socio-economic disadvantage (including lack of access to services and social exclusions). The case of *Z v Hackney and AIHA* demonstrates that the Equality Act 2010 delimits concessions and

⁶⁶ Quoted at [73].

⁶⁷ s.1 Equality Act 2010, c.15

considerations, which are certainly justifiable, for particular groups on the basis of socio-economic need, but this is not universal. As such, the precarity felt by those displaced from a community which emphasises home ownership as the expression of 'good' citizenship is manifested in the fact that the question of housing obligations and need is referred to the domain of liberal rights and equalities law. In reflecting on the pressing needs of people to have both shelter and a sense of community attachment, and on the demanding funding and policy context for local authorities in relation to housing, this paper concludes with a modest argument that the enactment of a socio-economic duty would, in the very least, ensure that locatedness and belonging are given regard to in strategic decisions about housing development and allocation, making justiciable the need and right to belong rather than entrenching dislocations.

Chapter 8

How much do you need to know? Perspectives on strict liability and criminal responsibility.

Lisa Claydon

Abstract

In 1969 the House of Lords were asked to consider whether the wording of a statute created an “absolute offence”. Stephanie Lavinia Sweet was a schoolteacher who rented out rooms in a farmhouse to students. It was accepted that she only visited the farmhouse occasionally and that she kept a room in the farmhouse for her own use. The appeal concerned three points of law:

- (i) Whether section 5(b) of the Dangerous Drugs Act 1965 creates an absolute offence
- (ii) What, if any, mental element is involved in the offence; and ... (iii) Whether on the facts found a reasonable bench of Magistrates, properly directing their minds as to the law, could have convicted the Appellant.

Stephanie Sweet had been convicted of being concerned in the management of premises and permitting those premises to be used for the smoking of cannabis. The House of Lords had to consider whether the junior courts had erred in their interpretation of the law.

This case is seminal because it considers the minimal fault elements required for criminal responsibility. The thread that connects many of the cases that acknowledge *Sweet v Parsley* as a precedent is that they are central to the debates surrounding criminal responsibility in the last fifty years. It is possible from the cases to gain a perspective of the view taken by the senior courts of criminal responsibility; and on occasion the politics and the policies that underpin the definition of responsibility. This chapter will examine and critique the reasoning adopted by the courts in interpreting and developing the criminal law.

1. Introduction

It is sometimes difficult to write a chapter which precisely fits the brief of the book of which it will form a part. But not so in this instance: two cases almost fifty years apart dealt very differently with the meaning of words in statutes. The issue, in both cases, was what mens rea elements should be read into a criminal law statute by a court interpreting and applying the law? *Sweet v Parsley*¹ was a landmark decision of the House of Lords given in January 1969. Nearly fifty years later in 2018, the interpretation of words in a statute was once more before the UK Supreme Court in *Lane and Letts*.²

The issues considered in *Sweet v Parsley* raise many questions that are still pertinent. Should mens rea always be part of the offence definition in serious crimes? Is what the accused thought in relation to the criminal act relevant or, alternatively, should the judgement of whether their act is criminal be made objectively, after the event? Should someone be convicted of a serious criminal offence when they could not prevent the outcome as they have

¹ *Sweet v Parsley* [1969] 1 All ER, 347, [1969] 2 WLR 470.

² *R v Sally Lane and John Letts* [2018] UKSC 36, [2018] 1 WLR, 3647.

no knowledge of relevant events? How should a statute that is drafted to catch a large class of people as potential criminals be interpreted and applied by the courts? These questions are even more pertinent when the outcome that is criminalised is only one of a number of possible outcomes that could happen as a result of the accused person's action. That is, what is criminalised is not an actual harm but rather engaging in behaviour that might bring about a harm; a task made more complex when that harm is not clearly defined in the criminal statute. The precise nature of this problem will become clearer as the facts of *Sweet v Parsley* and *Lane and Letts* are considered.

Analysing the reasoning in these two cases enables us to obtain an understanding of the perspective taken by members of the senior courts on criminal responsibility; and to see that on occasion government policy, parliamentary politics and social pressures affect the definition of criminal responsibility. This chapter will examine these issues and critique the reasoning adopted in legislating, interpreting, and developing criminal law.

2. Starting at the beginning.

In 1968 the House of Lords were asked to consider whether the wording of a statute created an 'absolute offence'. Stephanie Sweet, a schoolteacher, rented out rooms in a farmhouse near Oxford to university students. Sweet was convicted of being concerned in the management of premises and permitting those premises to be used for the smoking of cannabis. At her trial it was acknowledged that Sweet only visited the farm occasionally to collect rents and that, very occasionally, she stayed overnight in a room that she kept for her own use. At her trial it was stated that:

she did not enter the rooms of the tenants except by invitation, and she had no reason to go into their rooms. ... She had no knowledge whatever the house was being used for the purpose of smoking cannabis or cannabis resin.³

Sweet lost her job as a schoolteacher as a result of the conviction.⁴

The House of Lords was asked to consider whether the junior courts had erred in their interpretation of the law. In particular, they had to decide whether for the conviction to stand, it should have been demonstrated that Sweet knew that drugs were being used by those living at the farmhouse.

The case report makes it clear that the Law Lords had concerns about any legislation that created a serious criminal offence and imposed criminal sanctions without need for proof of mens rea. Lord Reid had no doubt that the offence, being concerned in the management of premises used for the purpose of smoking cannabis contrary to s 5(b) of the Dangerous Drugs Act 1965,⁵ was a serious offence. The issue before the House of Lords was whether the Act created an absolute offence.⁶

³ [1969] 1 All ER, 347, 349.

⁴ *The Court's Sympathy with Miss Sweet*, The Times, 24th April 1968 15.

⁵ s 5 Dangerous Drugs Act 1965 stated:

If a person – (a) being the occupier of any premises, permits those premises to be used for the purposes of smoking cannabis or cannabis resin or dealing in cannabis or cannabis resin (whether by sale or otherwise); or (b) is concerned in the management of premises used for any such purpose aforesaid; he shall be guilty of an offence against this Act.

⁶ Absolute liability has no precise definition. Ormerod, D and Laird, K, *Smith, Hogan and Ormerod's Criminal Law* (15th edn, Oxford, OUP, 2018) 146 gives the following explanation: 'The label "absolute offence" is best reserved for those rare situations where the offence criminalizes D whose conduct has caused an actus reus with no mens rea and who is precluded from relying on defences.'

There was a relevant legal precedent. The House of Lords had the previous year, in *Warner*,⁷ considered the issue of mens rea in relation to another drugs offence.⁸ The appellant, Warner, picked up two packages from a café, and a subsequent police search of his van revealed that one of the packages contained perfume and the other contained amphetamine sulphate, a prohibited drug. At his trial Warner claimed that he had expected both packages to contain perfume. The case was appealed to the House of Lords. The issue before the court was whether the trial judge had erred when he directed the jury that this alleged lack of knowledge could only go to mitigation of sentence. In his opinion Lord Reid said:

I understand that this is the first case in which this House has had to consider whether a statutory offence is an absolute offence in the sense that the belief, intention, or state of mind of the accused is immaterial and irrelevant. It appears from the authorities that the law on this matter is in some confusion, there being at least two schools of thought.⁹

The first of these two schools of thought was that mens rea was an element of every common law crime. Thus, even when Parliament chose to replace the common law offence by statute, the new offence should be interpreted as recognising the importance of mens rea in establishing guilt or innocence. The second school of thought was that new statutory offences regulating business practice could impose absolute liability. Regulatory offences of this type are referred to by Lord Reid as 'less serious offences'.¹⁰

The House of Lords upheld Warner's conviction. They found that he was liable by virtue of his possession of the prohibited drugs. However, the Law Lords' opinions on the matter of absolute liability were divided. Lord Reid, who was to give the leading opinion in *Sweet* was firm. He argued that there was, in the case of more serious offences, no reason to expect that the wording of a statute excluded mens rea. He accepted that for some considerable time, in the case of minor offences of a regulatory nature, it had been the practice of Parliament to use absolute liability to protect the public. He described these lesser offences as not attracting the 'disgrace of criminality'.¹¹

Reid in *Warner* referred to the line of cases that accept the right of Parliament to legislate to impose absolute liability saying:

The presumption is, that mens rea, an evil intention or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.¹²

Reid went on to say that the appellate committee had heard no evidence in the appeal of a 'truly criminal offence where absence of mens rea was not a defence'.¹³

Something of the meaning of 'truly criminal' can be gleaned from Reid's reference to *R v Tolson* and to a mention in that case of the offence entailing severe and degrading punishment.¹⁴ The reasoning Reid employed is that unfair convictions for serious criminal

⁷ *R v Warner* [1969] 2 AC 256, [1968] 2 All ER, 356.

⁸ The Drugs (Prevention of Misuse) Act 1964, s 1(1), provides that 'it shall not be lawful for a person to have in his possession' any of the specified substances unless in specified circumstances.'

⁹ [1968] 2 All ER 356, 360.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² [1968] 2 All ER 356, 361 citing Wright J in *Sherass v de Rutzen* [1895–99] All ER, 169.

¹³ [1968] 2 All ER 356, 363.

¹⁴ *R v Tolson* [1886–90] All ER R, 30.

offences taint a person's reputation, have a stigmatizing effect and may adversely affect employment opportunities. For this reason, Reid was of the view that Parliament could not have intended the creation of an absolute offence in terms of possessing a prohibited drug.¹⁵

Reid did not accept that the use of discretion not to prosecute such an offence would cure the ill of imposing absolute liability for a serious criminal offence: -

I dissent emphatically from the view that Parliament can be supposed to have been of the opinion that it could be left to the discretion of the police not to prosecute, or that if there was a prosecution justice would be served by only a nominal penalty being imposed.¹⁶

Nonetheless, Reid upheld Warner's conviction, on the grounds the conviction was not unsafe. This is because, according to Reid, the error in the trial judge's explanation of the law had no effect: 'Taking into account the prevarications of the appellant before he produced his final story and the whole circumstances, I cannot believe that any reasonable jury would accept that story.'¹⁷ Reid's conclusion is fairly understandable given that the trial judge had asked the jury to indicate whether they found that Warner knew that there were amphetamines in the parcel. The trial jury found that Warner did know. Reid's opinion dissented from the majority in that he found that the direction given by the trial judge was flawed. In his view the offence was not one of absolute liability and therefore, the trial judge's instruction to the jury was in error.

3. How much mens rea is needed to secure a conviction?

Given his statements in *Warner* it is not surprising that Lord Reid in his opinion in *Sweet* was sympathetic to Sweet's predicament.

Her appeal posed three questions on points of law:

- (i) Whether section 5(b) of the Dangerous Drugs Act 1965 creates an absolute offence
- (ii) What, if any, mental element is involved in the offence; and ... (iii) Whether on the facts found a reasonable bench of Magistrates, properly directing their minds as to the law, could have convicted the Appellant.

Reid viewed the conviction as unsafe. In *Warner* he commented on pressure on Parliament to formulate laws that would, by requiring little mens rea in relation to the act proscribed by law, make it easier to gain convictions. Reid found such an approach abhorrent for more serious crimes:

One or other House of Parliament has been asked on more than one occasion in recent years to approve of some change in the law which would increase the chance of convicting offenders, but has refused because it would or might also imperil the innocent. Although I would not entirely agree, I think that the general view still is that it

there is nothing in the mere form of words used in the enactment now under consideration to prevent the application of what is certainly the normal rule of construction in the case of a statute constituting an offence entailing severe and degrading punishment. If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognised as a matter fairly to be taken into account.

¹⁵ [1968] 2 All ER 356, 365.

¹⁶ [1968] 2 All ER 356, 366

¹⁷ [1968] 2 All ER 356, 370

is better that ten guilty men should escape than that one innocent man should be convicted.¹⁸

Press coverage and the social reaction to Sweet's conviction

Miss Sweet won her appeal but not before she had had a considerable fight to gain a hearing in the House of Lords. The biography of Rose Heilbron QC, who acted for Sweet, gives the background to Sweet's appeal to the House of Lords.¹⁹ The Divisional Court initially refused Sweet leave to appeal to the House of Lords, 'on the grounds that the charge was one of strict liability and knowledge and intent were not relevant'.²⁰ But Sweet was not without influential friends, most notably Robert Graves, the famous novelist and poet.²¹ Graves wrote an article published on the front page of the Sunday Times arguing that the imposition of absolute liability in such cases was profoundly unjust. The Sunday Times leader on the same day, 14th April 1968, argued that the real issue was the drafting of Section 5(b) of the Dangerous Drugs Act:

The case has serious implications at a time when many more people must be in danger of prosecution on the same grounds as Miss Sweet, and with as little culpability. They should not be branded as criminals before the Law Lords have had a chance to make sense out of bad drafting.²²

The fuss did not stop there; four MPs saw the Lord Chancellor and another MP, Emlyn Hooson QC, pressed for the law to be urgently reviewed by the Attorney General. Miss Sweet said: 'I am determined to take this as far as I can. I can't teach in England and I would find it extremely difficult to get a visa for the US, where I'd planned to go in about a year.'²³ Robert Graves lent money to fund Sweet's appeal. Graves approached Rose Heilbron, a leading QC, to ask her to represent Sweet in her appeal against conviction. Unsurprisingly the Divisional Court bowed to the pressure and the appeal to the House of Lords was permitted. On the 23rd January 1969, the House of Lords unanimously allowed Miss Sweet's appeal.

4. Attitudes to legislating criminal offences.

What should or should not be criminalised and how the law framing culpability should be stated in legislation is a matter of dispute. In terms of regulatory offences, from parking to pollution offences, there exists a body of legislation silent as to the need for mens rea to be proved for guilt to be established. The focus of the arguments concerning mens rea and criminalisation tends to be on the more serious criminal offences. This is for the simple and obvious reason that conviction of a more serious criminal offence has huge implications for personal wellbeing. Conviction of a serious criminal offence entails, in all likelihood, loss of freedom, livelihood, reputation, and home, and the stigmatising effect of a guilty verdict.

Therefore, one argument made by jurists is that the law, whilst being normative in identifying and criminalising serious harms to society, must also provide justice by allowing those who are not culpable to escape liability. The issue in Miss Sweet's case was that the law was framed in a manner that meant, as interpreted by the Woodstock Magistrates, she was guilty of a crime that she could not have avoided committing.

¹⁸ [1968] 2 All ER 356, 366.

¹⁹ Heilbron, H, *Rose Heilbron: Legal Pioneer of the 20th Century* (Oxford, Hart 2018).

²⁰ Ibid 275-6.

²¹ Robert Graves 1895 – 1985 for more information see Seymour, M, *Robert Graves, Life on the Edge*, (London: Doubleday 1995).

²² Ibid 277.

²³ Ibid 278.

In *Sweet v Parsley* Lord Reid criticised the manner of framing the legislation because it risked overcriminalisation.²⁴ The question then becomes, what should be the limits of the criminal law? This will become a particularly pertinent question when addressing the issues raised by the case of *Letts and Lane*. It is worth considering the facts prior to further considering the issue of criminalisation. The meaning attributed to the wording of the statute would have great significance to Sally Lane and John Letts. If an objective meaning was attributed to them, they might be liable under section 17 of the Terrorism Act 2000 for sending money to their son who had been nicknamed by the press 'Jihadi Jack', and who had travelled to Syria in 2014.²⁵

5. The meaning to be attributed to reasonable cause to suspect.

R v Lane and Letts reached the Supreme Court because Sally Lane and John Letts challenged the Crown Court's interpretation of the meaning of the words 'has reasonable cause to suspect' in s 17 of the Terrorism Act 2000.²⁶ Was the meaning to be attributed to these words a subjective or objective meaning? That is, did Lane and Letts have to actually suspect that the money might be used to fund terrorism, or was the assessment of reasonable cause for suspicion to be assessed objectively by the jury on the basis of the information available to Lane and Letts?

The appeal was based, inter alia, on the presumption expressed in *Sweet v Parsley* that in serious crimes 'the offence-creating provision ought to be construed as requiring an element of a guilty mind (mens rea) ... meaning that an accused must actually suspect the money may be put to terrorist use'.²⁷ Moreover, it was argued that the Court of Appeal had erred in interpreting the Act by looking at the context in which it was passed, placing too much emphasis on the fact that 'the statute was designed to protect the public against the grave threat of terrorism'. The argument put was that despite this being the purpose of the Act, it was not a reason 'to dilute the presumption.' The presumption being that 'an offence-creating provision ought to be construed as requiring an element of a guilty mind'.²⁸

The unanimous decision of the Supreme Court was given by Lord Hughes who firmly asserted that the role of the court in interpreting the provision was to give expression to the will of Parliament in passing the legislation. If Parliament decided that the 'gravity of the threat of terrorism justified attaching criminal responsibility'²⁹ then that was the will of Parliament. Degrees of blameworthiness could be reflected in sentencing. Hughes denied that this interpretation resulted in an offence of strict liability, though he admitted that 'an accused can commit this offence without knowledge or actual suspicion that that the money might be used for terrorist purposes'.³⁰

Hughes assertion would seem questionable, his interpretation of statute law would seem pretty close to the definition of strict liability in previous case law and in legal textbooks: 'Crimes which do not require mens rea or even negligence as to one or more elements in the actus

²⁴ For a fuller argument in terms of overcriminalisation see Husak, D, *Overcriminalisation*, (Oxford, OUP 2008).

²⁵ 'Jihadi Jack' parents funded terrorism: <<https://www.bbc.co.uk/news/uk-england-oxfordshire-48676894>>.

²⁶ s17. Funding Arrangements.

A person commits an offence if –

(a) he enters into or becomes concerned in an arrangement as a result of which money or other property is made available or is to be made available to another, and
(b) he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.

²⁷ [2018] UKSC 36 [7], [2018] 1 WLR 3647[7].

²⁸ Ibid all quotations.

²⁹ [2018] UKSC 36 [24].

³⁰ Ibid.

reus are known as offences of strict liability.³¹ Certainly, this definition would appear to impose strict liability, as the term was previously interpreted in *Warner* and in *Sweet v Parsley*. The decision in *Lane and Letts* raises many questions about the ambit of criminal offences and about how statute law should be interpreted, and criminal liability imposed.

6. Press Coverage

The press coverage surrounding the subsequent trial of Lane and Letts in 2019, at the Old Bailey, is not unsympathetic. The Telegraph reported the comments of the trial judge Nicholas Hilliard QC to Lane and Letts: 'It is one thing for parents to be optimistic about their children' but 'you did lose sight of the realities.' Two different perspectives are covered in the Telegraph report: those of the police, citing the comments of Detective Chief Superintendent Kath Barnes that 'It is not for us to choose which laws to follow', although she believed that the accused 'were not bad people', who would be going through agonies because of the choices made by their son. The other perspective was given by Letts' barrister, Henry Blaxland QC, who is reported to have told the court that the prosecution of John Letts was 'inhumane to the point of being cruel.'³² Sky News reported that Letts and Lane had 'turned a blind eye to warnings by police and charity workers that the money could inadvertently fund terrorism.' Sky reported that the couple had been desperate to persuade their son to return home and had attempted to send money to achieve that end.³³

Following their conviction BBC News reported that a statement was read by the solicitor acting for Lane and Letts. In the statement it was made clear that their primary aim was to get their son home. They had tried to work with the police to achieve this aim – but were prosecuted. The BBC reported that 'Letts and Lane criticised the government for their lack of action in helping Jack and others, return to the UK from Syria.'³⁴ One judge is reported as commenting that Lane and Letts were 'two perfectly decent people ... in custody because of the love of their child.'³⁵

Public opinion did not seem to support Lane and Letts' view of government inaction. In late 2017 Opinion ran an online poll that showed 77% of respondents felt that jihadist fighters should be prevented from returning to the UK; 42% believing that such fighters should be stripped of British citizenship. The survey showed that 77% of respondents believed that the fighters could never be reintegrated into British society. This antipathy in the country was echoed by politicians. Rory Stewart, then Foreign Office and International Development Minister, was quoted as saying 'We have to be serious about the fact these people are a serious danger to us, and unfortunately the only way of dealing with them will be, in almost every case, to kill them.'³⁶

This does not suggest that society would be sympathetic to the plight of the parents of 'Jihadi Jack' or to their fight to repatriate him. Nor does the reaction to the request for repatriation of the teenager Shamima Begum who is referred to in the media as an IS bride.³⁷ Begum was

³¹ Ormerod, D and Laird, K (2018) 143.

³² <<https://www.telegraph.co.uk/news/2019/06/21/jihadi-jacks-parents-found-guilty-funding-terrorism/>>.

³³ <<https://news.sky.com/story/jihadi-jack-parents-john-letts-and-sally-lane-guilty-of-funding-terrorism-11744699>>.

³⁴ www.bbc.co.uk/news/uk-england-oxfordshire-48676894.

³⁵ <<https://www.bbc.co.uk/news/uk-48662853>>.

³⁶ <<https://www.opinium.co.uk/government-british-jihadists/>>.

³⁷ <<https://news.sky.com/story/is-bride-shamima-begum-gives-birth-in-syria-11640060>>.

stripped of her British citizenship for her actions in travelling to Syria and marrying a terrorist.³⁸

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Such reactions raise questions about how a jury would reach an objective view of criminal liability when applying the statute's wording 'has reasonable cause to suspect that it ... may be used for the purposes of terrorism' to the facts of a case. Juries are specifically chosen for the role of finders of fact as part of society and therefore taken to reflect its views. If society is not sympathetic to repatriation then a jury may objectively interpret the phrase, 'he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism', in a different manner to that of the parent desperate to bring their son home.

7. Thinking about knowledge and reasonable cause to suspect as a culpability requirement

Most criminal law textbooks focus on two mens rea states: intention and recklessness, which are used to describe blameworthy states of mind. The requirements of knowledge are usually given less prominence.⁴⁰ It is worth stressing that the discussion of knowledge as a mens rea state differs between *Sweet v Parsley* and *R v Lane and Letts*. In *Sweet* it relates to circumstances that existed at the time of the crime. Whereas in *Lane and Letts* the 'knowledge' is surmise as to circumstances that may have occurred had all the money reached their son.

The press reports of the trial of Lane and Letts describe the view of the court and of the prosecutors as being that the parents lost sight of reality or, at worst, turned a blind eye to the possibility that (a reasonable person might suspect) the money that they sent, and planned to send, to their son might be used for the purposes of terrorism. Such a suggestion is a long way from actual knowledge that a set of circumstances will occur. Furthermore, their actions are not linked to any known outcome but rather to a possible outcome – 'might be used'.

In *Lane and Letts*, it seems clear that for the accused funding terrorism was not their aim. Their primary aim is acknowledged by the court: and it is to get their son home safely. The outcomes of their action, if all their payments had reached their son successfully, is in the realms of speculation. Speculating on circumstances that might have occurred is very imprecise as a way of determining criminal responsibility: a range of things might have happened had their son received the money they wished to send.

8. Broadening the base of potential criminal liability.

How far should the government, though Parliament, proceed with broadening the base of criminal liability? How far should prosecutors, defenders and the courts be able to speculate upon the possible outcome of a person's behaviour when no actual harm has to have resulted?

Letts and Lane were convicted of a terrorism offence. Terrorism legislation is often introduced in response to horrific events. A reading of Hansard reveals that the Counter Terrorism Bill in 2018 was introduced in the House of Lords using emotive rhetoric reminding Parliament of the victims of terrorism.⁴¹ Baroness Warsi expressed concern about the wording of one of the

³⁸ <<https://www.theguardian.com/uk-news/2019/oct/24/shamima-begum-faces-extreme-scenario-in-citizenship-appeal>>.

³⁹ Begum's appeal against the order removing her British citizenship was heard by SIAC (Special Immigration Appeals Commission) and was rejected see Appeal No: SC/163/2019, 7 February 2020.

⁴⁰ Though two exceptions are worth mentioning: Ormerod, D and Laird, K (2018) 154-120 and Wilson W., *Criminal Law*, (6th edn, Pearson 2017) 148-50.

⁴¹ Lords Hansard vol 793 3.17pm 9th October 2018 per Baroness Williams of Trafford:

'It is easy to reel off statistics. Seventeen Islamist or far-right terrorist plots have been thwarted since

offences created by the Bill, which as enacted criminalises the sharing of certain photographs, where there is a reasonable suspicion that the 'person is a supporter of a proscribed organisation'. Baroness Warsi questioned the need for the new legislation when existing laws were, in her view, sufficient to protect society. She was particularly concerned about the lack of consultation regarding the creation of the new offence. The offence has now been enacted as s 2(3) of the Counter Terrorism and Border Security Act 2019.⁴² Baroness Warsi particularly deplored the failure to engage with groups most likely to be at risk of criminalisation, journalists and those who worked for human rights organisations.⁴³ Once again, no actual suspicion is required, just evidence that from an objective viewpoint, and with hindsight, there could have been a reasonable suspicion that the person, or item of clothing in the photograph supports a proscribed organisation. This new criminal offence potentially criminalises journalists or bloggers who retweet or share photographs.

The problem created by the Supreme Court decision in *Lane and Letts* is not only that the objective definition based upon the views of the reasonable person may unfairly criminalise individuals, but that it creates an unfortunate legal precedent. It creates an interpretation of a statutory provision that potentially could criminalise broad swathes of the British population. In part this is because of the legal definition of terrorism.⁴⁴

March 2017; as of June, there were some 3,000 subjects of interest known to the police and intelligence agencies, and 412 arrests for terrorism-related offences in 2017. But dry statistics can never bring home the pain and sorrow suffered by individual victims of terrorism. Over recent weeks, we have heard the harrowing testimony at the inquest into the deaths of the five victims of last year's terrorist attack on Westminster Bridge and at the gates of this very building. In this and the four subsequent attacks in 2017, in Manchester, London Bridge, Finsbury Park and Parsons Green, a further 31 innocent victims lost their lives, and in total over 200 others were injured. The family and friends of those who lost their lives will have to live with this painful loss for the rest of their lives, while the victims who survive have to deal with the ongoing mental anguish and, in some cases, life-changing physical injuries.'

⁴² 2 *Publication of images and seizure of articles*

(1) Section 13 of the Terrorism Act 2000 (uniform) is amended as follows.

(2) In the heading, after "Uniform" insert "and publication of images".

(3) After subsection (1) insert—

(1A) A person commits an offence if the person publishes an image of—

(a) an item of clothing, or

(b) any other article, in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation.

⁴³ Lords Hansard vol 793 5.32pm

⁴⁴ s1 of the Terrorism Act 2000 As amended interprets the offence of terrorism:

1. — *Terrorism: interpretation.*

(1) In this Act "*terrorism*" means the use or threat of action where—

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government [or an international governmental organisation] or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious [, racial]² or ideological cause.

(2) Action falls within this subsection if it—

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

The Terrorism Act 2000 defines terrorism to include in s 1(1) use or threat of action designed to influence the government or 'intimidate a section of the public' for 'advancing a political, religious, racial, or ideological cause'. Many protest groups may have this purpose. Even though they would not generally be thought of by the public as terrorist organisations.

Additionally, s1(5) includes within the term action for the purposes of the section – 'action taken for the benefit of a proscribed organisation.' Potentially therefore it is possible for the state to designate protest groups as proscribed organisations under the Terrorism Act and this may bring those groups, or members of those groups within the definition of terrorism for certain offences.⁴⁵

The Guardian reported in January 2020 that the non-violent protest group Extinction Rebellion had been placed, by anti-terrorism police, on the register of organisations who are extremist and should be reported under the Prevent Programme.⁴⁶ The same paper also reported that this action was supported by the Home Secretary Priti Patel. This action and the Home Secretary's support for this action drew widespread criticism and Extinction Rebellion were removed from the list.⁴⁷ Deputy Chief Superintendent Kath Barnes, who featured in press reports of the conviction of Lane and Letts, is quoted as saying:

I would like to make it quite clear that we do not classify Extinction Rebellion as an extremist organisation. The inclusion of Extremist Rebellion in this document was an error of judgment and we will now be reviewing all of its contents as a result.⁴⁸

This statement seems to imply that the designation of organisations as extremist, or not, is a matter for the police. But they will only review the list of organisations included as extremist when there is a significant public outcry – not before. This then opens the possibility that taking this cue such organisations may over time become proscribed organisations.⁴⁹ This must be

(4) In this section–

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) "the government" means the government of the United Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

⁴⁵ Reasoning in relation to the definition of terrorism can be quite labyrinthine - See *Secretary of State for the Home Department v LG and others* [2017] EWHC 1529 (Admin) a case in which the court reviewed the operation of s1(5) of the 2000 Act in relation to the Terrorism Prevention and Investigatory Measures Act 2011 and concluded 'Reference has been made to several proscribed organisations in these proceedings, as I shall explain. However, I am asked to note that TA 2000 s.1(5) is *not* incorporated into the definition of terrorism for the purposes of the TPIMA 2011 by s.30(1). However, rather confusingly, the term 'act of terrorism' does include anything constituting an action taken for the purposes of terrorism within the meaning of TA 2000 s.1(5) – see TPIMA 2011 s.30(1)'.

⁴⁶ <https://www.theguardian.com/uk-news/2020/jan/10/xr-extinction-rebellion-listed-extremist-ideology-police-prevent-scheme-guidance>.

⁴⁷ <https://www.theguardian.com/environment/2020/jan/13/priti-patel-defends-inclusion-of-extinction-rebellion-on-terror-list>.

⁴⁸ Ibid.

⁴⁹ Indeed at the time of writing, eco-central, a group who support claims made in denial of climate change, <https://edition.independent.co.uk/editions/uk.co.independent.issue.141120/data/9725131/index.html> have a petition out for signature. The petition requests that the Home Secretary add extinction rebellion to the list of proscribed organisations under the Terrorism Act. <https://eco-central.co.uk/petition/sign-our-petition-proscribe-extinction-rebellion-as-a-terrorist-organisation/>.

a matter of concern. Particularly, where legislation is being worded so as to catch classes of actors, then the wording of clauses that contain the rubric “reasonable suspicion” of loosely defined outcomes may potentially criminalise a wide range of behaviours previously viewed as not criminal. The line between criminal regulatory offences controlling business activities and offences that criminalise acts in the personal sphere risks becoming ever more blurred.

9. Is too much criminalisation a bad thing?

On the one hand it can be argued that the prosecution of members of society like Lane and Letts has some utility. They had been co-operating with the police and had formed a different view from the authorities of the necessity of sending money to their son. They failed to take advice from the police and their prosecution may discourage others from acting in the same way. Such an argument might run that if everyone who had a close relative involved with a group that might contravene s17 of the Terrorism Act 2000 - was free to send money to aid their relative, then the world would be a less safe place. Whether such a view might be supported by evidence is more debatable. In relation to the section of the Act that criminalised Lane and Letts, that argument does not really hold true. The scope of the activity that is criminalised is so ill defined, the criminal act exists in the realm of things that might happen, not in the failure to take police advice. Thus, the possibility of an increase in public safety has to be balanced against by the risk of arbitrary conviction and detention of those who did not think the outcome perceived by the prosecuting authorities would be a possible result of their action.

A further problem is that the accused, on the wording of the statute as interpreted by the Supreme Court, not only does not have to perceive the risk; she does not have to realise that the organisation could be deemed to be terrorist. As has already been canvassed, the definition of terrorism is very broad indeed and does not just include groups that are unarguably terrorist in their aim. Greenpeace and Extinction Rebellion have attracted the attention of the police and been considered at times to be extremist groups that should be ranked alongside terrorist organisations in terms of Prevent Strategies.⁵⁰ Moreover, the views of the jury as to the existence of a reasonable cause for suspicion that money may be used to support terrorism will suffice for a conviction, even though it may never have occurred to the accused.

Another argument might be that the legislators in Parliament will protect the democratic interests of the individual and that therefore, law as made by Parliament should be respected. Baroness Helena Kennedy, a member of the House of Lords, commented on the pressure put upon her when she voted against the Labour whip in order to oppose legislation. Describing the views expressed by the whip, she writes that he suggested that she was ‘completely out of touch with the concerns of voters for whom it was “just law”, not as important as “health or education or the economy”’.⁵¹ Kennedy argues this approach leads to a failure to protect minorities and protect civil liberties. Kennedy points out that this is nothing new, and neither is the argument that supports the erosion of civil liberties, that ‘new restrictions are designed to convict the guilty and decent citizens have nothing to fear’.⁵² She concludes that, ‘Law matters. And ... it is certainly too important to be left to politicians, whose desire for short term gains makes them cavalier with long term interests.’⁵³ Care therefore needs to be taken when expanding the ambit of the criminal law. Either in the interpretation of statute law by the courts

⁵⁰ <https://www.theguardian.com/uk-news/2020/jan/17/greenpeace-included-with-neo-nazis-on-uk-counter-terror-list>.

⁵¹ Kennedy, H, *Just Law*, (Chatto and Windus 2004) 7 all quotations.

⁵² Ibid.

⁵³ Ibid.

or by the passing of legislation. An example of the desire for short term gains are two Bills before Parliament. Both as presented in Parliament seem to abrogate the rule of law.⁵⁴

10. Changes in the past 50 years.

Looking back over the last 50 years there are a number of changes to the criminal law and criminal justice system that are remarkable. One major change is the acceptance that a crime that has serious consequences for those convicted can be an offence that imposes something close to absolute liability as defined by Lord Reid in *Warner*.⁵⁵

Reid, in his two opinions in *Warner* and *Sweet*, accepted the imposition of absolute liability where the purpose of a less serious criminal offence is regulatory. However, Reid was concerned about the liberty of the subject and, whilst he expressed no view as to how Parliament should legislate, he did express a view about the need for transparency in making legislative changes. 'I would hold without hesitation that it would be wrong to impute to Parliament an intention to depart from its known desire to prevent innocent persons from being convicted.'⁵⁶ He suggested that Parliament should make clear any change of policy with regard to criminalisation and, when enacting legislation, should give reasons for any approach that did not respect established legal principles. This would highlight changes to the development of the criminal law.

Reid traced the roots of absolute liability in the criminal law to business regulation and argued that in terms of liability for business the imposition of absolute liability could be necessary. His reasoning was that regulatory offences were 'the original type of absolute offence' and the conviction for such an offence was punished by a fine. In this type of offence, he surmised that 'a right to prove absence of mens rea would sometimes go too far.'⁵⁷

Reid did speculate that there might need to be some sort of half-way house between subjective and absolute liability. He considered precisely the type of liability that was imposed in *Lane and Letts*, rejecting the idea that such criminal liability should be extended beyond the regulation of business -

If, however, there is to be a halfway house between the common law doctrine and absolute liability, there could be an objective test: not whether the accused knew, but

⁵⁴ The two Bills are the Covert Human Intelligence Sources (Criminal Conduct) Bill that would permit the pre-authorisation of criminal acts in certain defined circumstances and the UK Internal Market Bill which if enacted as published would contravene existing treaty arrangements and thereby breach international law.

⁵⁵ These regulations purport to make any ordinary member of the public guilty of a very serious offence if a drug within the meaning of the Act is "in his actual custody". Any person may, and most people do, from time to time take into their custody an apparently innocent package without ascertaining what it contains, without having the slightest reason to suspect that it may contain anything out of the ordinary, and indeed without having any right to open the package and see what is in it. If every person who takes such a package into his custody must do so at his peril, then this goes immensely farther than any enactment imposing absolute liability has yet been held to go, and I refuse to believe that Parliament can ever have intended such an oppressive result." [1968] 2 All ER 356, 366

⁵⁶ The full quotation is:

Members of both Houses are particularly interested in the liberty of the subject, and if it were intended by those promoting a Bill to extend the old but limited class of cases in which absence of mens rea is no defence I would certainly expect Parliament to be so informed. Then, if Parliament acquiesced, those who dislike this kind of legislation would know whom to blame. If, however, the words of the Act are not crystal clear and Parliament has not been told of this intention, I would hold without hesitation that it would be wrong to impute to Parliament an intention to depart from its known desire to prevent innocent persons from being convicted." [1968] 2 All ER 356, 366

⁵⁷ [1968] 2 All ER 356, 367

whether a reasonable man in his shoes would have known or have had reason to suspect that there was something wrong. I would not support an objective test where the ordinary member of the public is concerned, but it is not unreasonable to say that if a person engages in some particular business he must behave as, and have the capacity of, the ordinary reasonable man.⁵⁸

Clearly times and views of liability have changed. Lord Hughes and the rest of the Supreme Court in *Lane and Letts* did not object to the extension of such a test to an ordinary member of the public for an offence where the punishment was not limited to a fine, the stigma attached to conviction was great, the offence was a serious crime, and the act required by the offence was not clearly defined.

The act that Lord Reid was talking about in *Warner* is clearly defined. It is possession of a prohibited substance. Even for a defined act Reid concluded there was a need to avoid convicting innocent members of the public. Why the difference in the approach of the highest court in the land to two cases separated by fifty years? Why the assimilation of legislative and interpretive approaches necessary for the regulation of business to the regulation of individual liberty?

11. Protecting individual liberty- respecting the limits of criminalisation.

One major change in the past fifty years has been the establishment of the Crown Prosecution Service (CPS) as the public authority that prosecutes crime. When *Sweet* was charged, she was prosecuted by Sergeant Parsley of the local police force. A report published in 1981, by the Royal Commission on Criminal Procedure,⁵⁹ recommended that it was inappropriate for the police to both investigate and prosecute crimes. The CPS receives prosecution files from the police after the accused is charged with an offence and then makes a decision with regard to prosecution of that charge. The exercise of this discretion is informed by the Code for Crown Prosecutors.⁶⁰ The Code requires prosecution to proceed where there is a realistic chance of conviction and the prosecution is in the public interest.⁶¹ Had the CPS existed in the 1960s it is possible that, taking a dispassionate view, they might not have prosecuted *Stephanie Sweet*.

But the difficulty of creating a law that is very widely framed and therefore potentially criminalises a wide number of people is not really cured by removing prosecution decisions from the police. The concerns that attached to *Sweet's* conviction and the creation of liability of the type enacted by the anti-terrorist legislation discussed above have more to do with the idea of liberty of the individual subject. The issue is the need to balance the political pressures to protect society from harm with the need to respect individual autonomy.

12. Conclusion

There is a strong argument for vigilance in terms of the use of the criminal law to restrict the liberty of individuals, especially where it limits their ability to interact with others; and the act that is criminalised imposes a duty of care on ordinary people in the manner described by Lord Reid as unacceptable. There is some agreement as to this amongst criminal law commentators. Husak suggests that there is a need for a workable criminal law theory to limit the tendency of governments to pass too many criminal laws. He suggests that the failure to identify a strong basis to argue against new laws is problematic and leaves those who argue

⁵⁸ Ibid

⁵⁹ Cmnd. 8092.

⁶⁰ <<https://www.cps.gov.uk/publication/code-crown-prosecutors>>.

⁶¹ See the code for full details of how the tests should be applied.

against extensions to the criminal law: 'vulnerable to the politically powerful complaint that they oppose such legislation because they are "soft on crime"'.⁶²

Helena Kennedy argues that the process by which it becomes acceptable to frame terrorism laws to have a broad reach, is itself corrosive of society's views of liberty and its respect for the liberty of individuals. She also points out that by carving out a separate category of terrorists, it is easier for those 'who bomb and maim to claim to be political prisoners rather than criminals.'⁶³ Arguably one way in which terrorism offences have become corrosive of liberty is that they have taken the clothes of regulatory offences. These regulatory offences had traditionally been seen as less serious offences often punishable by fines. But terrorism offences are serious criminal offences.

Lord Diplock considered in *Sweet* the limits of criminalisation. He concluded offences that regulate 'a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not,'⁶⁴ were appropriate for regulation by the criminal law; and that they imposed a 'higher duty of care' on those in business. Diplock stressed an inference that a statute imposed such liability was not to be lightly drawn.⁶⁵ People who have chosen to engage in business pursuits that put others at risk must, in Diplock's view, be prepared to shoulder the higher duty of care. Nonetheless his opinion supported allowing *Sweet*'s appeal.

12.1 What are the proper limits of the criminal law?

That question can only be answered briefly here. Lords Reid and Diplock were certain that the ordinary person's liberty should be protected by the courts. The extension of a higher duty of care to business operations and the imposition of a criminal penalty based on a half-way house to absolute liability was only acceptable, to Reid, if enacted as such by Parliament and flagged up by the legislature as a novel act. Furthermore, the reasoning behind the creation of criminal liability had to be specified. He was certain in his view that such liability should not be imposed on the ordinary individual but was acceptable as an expansion of the duty of care owed by the business community to society. This has not been the recent practice of the legislature.

Duff suggests that the problem when considering the need for new criminal offences is not whether the crime is serious or minor, but whether the law is needed at all. This argument has its attractions in that he distinguishes between the creation of the law and its implementation. He does this in a manner not dissimilar to Reid in *Sweet*. What Duff suggests is that the legislature ought to consider a number of questions prior to legislating.

First there is the question of valid need – is there really a reason to protect society from such conduct? Second, how should such protection be framed: should it be enforced by the civil law and subject to civil law remedies or criminalised – enforced by punishment, by deprivation of liberty, or some sort of financial penalty?⁶⁶

One could add to these a requirement that the law should not go further than it need to in criminalising conduct. This would ensure that the response to the perceived threat is

⁶² Husak, D, *The Philosophy of the Criminal Law* (Oxford, Oxford University Press 2010) 118.

⁶³ Kennedy, H (2004) 32.

⁶⁴ [1969] AC 132, 163.

⁶⁵ Ibid. What Diplock argues next shows how modern legislation may have pushed at this boundary in an unacceptable manner. For Diplock a characteristic of regulatory legislation is that it should be possible for those citizens in positions of authority to 'directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control' to 'promote the observance of the obligation.'

⁶⁶ Duff, A R *Answering for Crime*, (Oxford, Hart 2009) 91-92

proportionate to the aim of protecting society. Proportionality is part of a principled approach to the criminal law. It suggests that the interference of the criminal law in the lives of individuals should be kept to a minimum. Horder describes this principle, of minimal criminalisation, as based on humane values that he sees as important in protecting the human rights of people subject to the criminal law. Examining the regulatory criminal law, Horder also sees its proper domain as business related. 'Companies may be found to be at fault in criminal law, but they are incapable of emotional suffering.' The distinction for Horder in the regulation of companies by the criminal law is that 'they can legitimately be created and destroyed at will, and hence cannot enjoy the same status as human beings.'⁶⁷

12.2 What about public opinion?

In *Sweet* there was sufficient precedent for the court to interpret the law in accordance with traditional mens rea principles. The House of Lords was not likely to be criticised by the media or the government following the successful media campaign initiated by Rupert Graves. But in *Lane and Letts* the court did not apply traditional principles to the interpretation of the criminal law as they might have done. The societal and political view of British citizens who are labelled 'jihadist' has been set out above.⁶⁸ It seems likely that in such circumstances the Court might feel pressure to be respectful of parliamentary legislation. Clearly where there is ambiguity, there is in Husak's words a possible risk of being 'vulnerable to the politically powerful complaint that they oppose such legislation because they are "soft on crime"'.⁶⁹ It is possible that the courts may feel bound in such circumstances to apply the reasoning in regulatory criminal cases to the interpretation of statutes that limit the freedom of the 'ordinary man'.

In such a political environment the individual liberty of the subject may be undermined and even subjectively innocent activities, such as the sharing of photographs, objectively criminalised. How does this happen when the constitution requires Parliament to scrutinise legislation? In 1996, slightly more than halfway through the fifty-year period, Klug, Starmer and Weir published an analysis of political rights and freedoms in the UK, *The Three Pillars of Liberty*.⁷⁰ Their conclusions are fairly damning as to the success of the three pillars in protecting the subject's liberty. They identify the pillars as parliamentary sovereignty, a public culture of liberty and the Rule of Law. They argue these are the means that could be used in British democracy to protect political rights and freedoms. In terms of parliamentary sovereignty, they identify as problematic and undermining, 'official complacency'. They argue such complacency is 'compounded by the informality' of the British constitution. The flexibility of this constitution enables, on occasion, 'careless conduct at all levels of government'.⁷¹

In terms of parliamentary scrutiny of legislation, they comment that the executive drives through legislation, is not amenable to amendments because of the drive to get government business done, and particularly ignores amendments if they are from opposition members. They also argue that the House of Lords, as an unelected body, lacks credibility and that, too often, committees who should do much of the work of scrutinising Bills before Parliament fall prey to politically entrenched positions. They find that the role of expert opinion on the appropriateness of new legislation is often overlooked or lost in these processes.⁷²

⁶⁷ Horder, J, *Ashworth's Principles of the Criminal Law*, (9th edn, Oxford, Oxford University Press 2019) 73. Horder goes on to modify this statement by pointing out that millions of people's welfare and happiness depends upon the flourishing of business enterprises.

⁶⁸ See n36 above and accompanying text.

⁶⁹ See n 59 above.

⁷⁰ Klug, F, Starmer, K and Weir, S *The Three Pillars of Liberty*, (New York, Routledge 1996).

⁷¹ Ibid 133.

⁷² Ibid.

In 2002, in her lecture series *Legal Conundrums in our Brave New World*,⁷³ Helena Kennedy argued that the case for civil liberties is complex and ‘needs more than a soundbite.’⁷⁴ She provides the evidence in the book that leads to two questions that are relevant and need to be addressed in terms of the manner in which legislation is carried out in the twenty first century. They are questions that require society to be open in addressing the needs of those who are disadvantaged and disempowered. The first is whether our historic memory of our own experience of oppression is retreating? The second is: Are memories of the conflicts in Northern Ireland and the terrifying oppression of whole sections of communities by the Nazi regime becoming dim memories, no longer considered relevant by the majority of the population?

Kennedy argued in the lectures that there is a fundamental disconnect between the experience of the majority of British people and the experience of asylum seekers and refugees. This, in her view, contributed to an acceptance of new legislation that could erode individual liberty. She argued that prosperous parts of the community lack knowledge of what it feels like to be on the wrong end of the criminal law – ‘to be powerless and marginalised, at risk of being caught in a backlash where the law may be your only shield.’⁷⁵

But is Kennedy correct? Examining the case of *Lane and Letts*, public opinion as expressed through the media seemed to support criminalisation because of a real fear of victimisation by returning terrorists. There is little discussion of the actual concept of liberty in the media, and therefore evidence to support a thesis of disinterest is hard to find. However, there is evidence, from polling, that ignorance of pending new legislation that will curtail liberty may be widespread. A COMRES poll in 2016 found that of those polled 72% were not aware of new provisions in the Investigatory Powers Bill before Parliament. The Bill proposed legislation enabling an expansion to the legal interception of private communications. Once made aware of the provisions of the Bill, 90% of respondents thought the powers as framed unacceptable.⁷⁶ This suggests that, at least in terms of personal privacy, there is quite a strong concept of individual liberty.

12.3 Care in the framing of and interpretation of legislation is required.

To conclude, whilst it is accepted that laws may need to be passed to protect populations from terrorist attacks, it is important for Government to consider who it labels as terrorist and by the creation of new laws subjects to criminal punishment. The potential criminalisation of parents trying to exercise what they perceive as their parental responsibility, or those who have real concerns about the environment and wish to express them through peaceful protest, will not increase national security. Miss Sweet may well have captured the sympathy of the media and judges in 1969; and “Jihadi John” have deserved the condemnation of his actions by the media. But government responses to terrorism in criminalising those whose purpose is to bring their son home, or journalists who do not interpret an image as terrorist, is a step too far. It is not proportionate to the risk created.

Confident, mature democracies have to accept a measure of risk in order to function effectively. How much risk should be a matter for informed public debate. Factionalised, politicised debate confined within the legislature is unlikely to be helpful. Society needs to understand what proposed legislation will mean for individual liberties. It needs to be shown that unintended consequences of legislation have been considered and that meaningful consultation has taken place. Such an approach could prevent the easy acceptance of the

⁷³ (Sweet and Maxwell 2004).

⁷⁴ Ibid 2.

⁷⁵ Ibid.

⁷⁶ <<https://www.libertyhumanrights.org.uk/news/press-releases-and-statements/ninety-cent-brits-believe-government-surveillance-powers>>

need to restrict individual liberty, without proof of a real necessity, becoming a defining feature of the legislative process. The argument that needs to be made regarding individual liberty is that legislative responses should be necessary, considered, proportionate and measured. Governments must understand and listen to expert opinion as to the effect and effectiveness of new legislative proposals. Additionally, that opinion should be considered and appropriately challenged to establish a real need for legislative action.

There needs to be a further proviso before the creation of new criminal laws of the type that have been considered in this chapter. Those laws that regulate behaviour by criminalising the conduct of the ordinary person, conduct that would not otherwise be viewed as wrong or criminal, should be clear and precise in their ambit. The reason for the existence of such laws must be clearly articulated. Furthermore, the ambit of the law should be as limited as it can be, to effectively achieve its end. The question of whether the use of the criminal law is necessary to achieve the end desired by the government should be central to executive reasoning when introducing legislation. The reason for the introduction of the measure needs to be clearly set out in a manner that engages scrutiny and public debate of the issues. The problems that confronted the House of Lords in *Sweet v Parsley* are as relevant today as they were fifty years ago. They have taken new form but with care, and political will, they could be resolved.

Chapter 9

Caroline Derry

Consenting to Sexual Activity

Abstract

This chapter explores how legal understandings of sexual consent have developed over fifty years. It begins with the immediate aftermath of *DPP v Morgan*,¹ which controversially placed the defendant's subjective perspective at the centre of criminal liability. Subsequent legal developments, leading up to and extending beyond the Sexual Offences Act are evaluated. The chapter asks why, despite a new, statutory definition of consent, the law on sexual consent remains highly contentious today. It explores possible answers through consideration of two particularly problematic areas – intoxicated consent and consent obtained by fraud – and asks whether the concept consent is adequate at all. Having examined the problems around the law on sexual consent, the chapter concludes by considering what the next steps might be.

1. Introduction

The last half-century has seen an important shift in legal understandings of consent to sexual activity, largely prompted by feminist campaigns and critiques. Fifty years ago, violence against women had become a central issue for the women's liberation movement: Chiswick Women's Aid opened the first women's refuge from domestic violence in 1971, and the first Rape Crisis Centre opened in London in 1976.² Practical experiences combined with feminist theories informed calls for legal change, as when London Rape Crisis Centre submitted evidence to subsequent committees and commissions through the 1970s.³ Sexual offences are an area of law where feminist critiques have had particular impact, but reforming the law has not resulted in straightforward progress.

While the legal definition of consent started to move away from a rigid requirement of 'force, fear or fraud' as early as the nineteenth century, fifty years ago it remained firmly focused upon the defendant's subjective view. The House of Lords decision in *DPP v Morgan* confirmed that a defendant's honest belief in consent, however unreasonable, would absolve him of criminal liability. Critical reaction to this case gave impetus to efforts to reform both the law and its application. These ultimately led to a new definition of consent in the Sexual Offences Act 2003 which aimed to transform understandings of consent in sexual relations. Nonetheless, shortcomings persist both in the legal provisions and in their implementation by the criminal justice system. Above all, the wider social and cultural context within which sexual activities are negotiated means that defining the boundaries of lawful consent remains highly

¹ *DPP v Morgan* [1976] AC 182

² Felicity Kaganas, 'First Women's Refuge, 1971' in Erika Rackley and Rosemary Auchmuty (eds), *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland* (Oxford, Hart Publishing, 2019); Alison Diduck, 'First Rape Crisis Centre, 1976' in Rackley and Auchmuty, *Women's Legal Landmarks*.

³ Diduck, 'First Rape Crisis Centre, 1976' 323.

contentious. This chapter examines how legal understandings of consent to sexual activity have developed, and the difficulties which persist.

2. The significance of consent

Sexual activity can be one of life's more enjoyable experiences, or one which causes physical and psychological injury, trauma, and distress. Between the extremes of joyful mutual consent and violent coercion are a vast and complex range of reasons for engaging in sex: a few examples include a sense of obligation, affection, curiosity, an attempt to become pregnant, coercion through threats, reluctant agreement to avoid provoking anger, altruism, hope of gaining some benefit from the other person, or an attempt to achieve popularity or self-worth. Its legal meaning is equally variable: a certain sexual act (penile penetration of the vagina) is a requirement for the validity of a marriage between a man and a woman.⁴ Yet that same act can form the *actus reus* of rape: one of the most serious criminal offences carrying a maximum penalty of life imprisonment.⁵ If similar physical acts can carry such very different personal, social, and legal meanings then how does the law differentiate between them?

It does so primarily through the notion of consent.⁶ However, this chapter explores the ways in which consent is a surprisingly complicated concept dependent as much or more upon social and cultural norms as upon legal definitions. In England and Wales, the last half-century has seen an important shift in the law's understandings of consent to sexual activity, largely prompted by feminist campaigns and critiques. The criminal law's definition of consent has undergone profound change, although we will see that its implementation has not. Nor is the definition itself clear or straightforward, and the courts are still struggling to define its limits. To understand why consent continues to be such a complex and contested concept, we will explore these developments and their wider social context. We will end with a consideration of the key areas of difficulty and dispute today, including the question of whether the concept of consent itself is adequate.

It will be helpful to explain at the outset that consent underpins not one but two elements of most sexual offences. The absence of *actual* consent is necessary but not sufficient to make otherwise-lawful sexual activity a criminal act. There must also be an absence of *belief* in consent. A person who sexually touches someone who does not consent has committed the *actus reus* of an offence but will only be guilty if they also have *mens rea*, i.e. they did not believe the other person was consenting. Whether that *mens rea* should be subjective (dependent upon the defendant's own state of mind) rather than objective (requiring them to take reasonable care to ascertain consent) has been an important area of debate and development in the law and is considered in this chapter.

3. The rise in concern

Before 1994, rape was a wholly gender-specific offence: it could be committed only by males and only against females. It still requires penile penetration, but since the Criminal Justice and Public Order Act 1994 it has been gender-neutral as to victim.⁷ Until 2003, there were two separate offences of indecent assault differentiated by the victim's sex,⁸ but under sections 2 and 3 of the Sexual Offences Act 2003 both sexual assault by penetration and sexual assault are now gender-neutral offences. Nonetheless, the law's highly gendered history as well as

⁴ Section 12(1), Matrimonial Causes Act 1973. There is no equivalent requirement for marriage between people of the same sex (Marriage (Same-Sex Couples) Act 2013; section 12(2), Matrimonial Causes Act 1973).

⁵ Section 1, Sexual Offences Act 2003.

⁶ This chapter discusses consent in the context of sexual activity between adults. There are separate offences criminalising sexual activity with or between children, which are outside the scope of the chapter.

⁷ Section 142(1) provided, 'It is an offence for a man to rape a woman or another man.' The *actus reus* was expanded to include penile penetration of the anus as well as the vagina.

⁸ Sections 14 and 15, Sexual Offences Act 1956.

the fact that these offences are overwhelmingly committed by males, with females the majority of victims, mean that understandings of consent are profoundly gendered.⁹

Fifty years ago, the criminal law's understanding of rape away had already moved away from its origins as a property crime against husbands or fathers. A corresponding legal shift from a requirement of force to one of non-consent was already a century old;¹⁰ although we will see that the shift was partial at best until the 1980s.¹¹ However, although sexual offences were now understood as a crime against women themselves, the law's approach remained rooted in notions of honour and marital value rather than sexual autonomy. Society, though, was changing drastically: the 1960s had seen the rise of both the sexual revolution and the women's liberation movement. While the two differed in fundamental ways about many aspects of women's sexuality, both challenged the notion that it should only be expressed within marriage and that women's value was intimately connected to their chastity. When feminists shared their experiences of sexual violence, they identified it as a large and hidden problem. Speaking out about it, campaigning and protesting, and establishing support services were crucial, but *Morgan* focused feminist attention on the need for better legal responses as well.

A culture of disbelief in the legal system was recognised as one of the key issues facing women who had experienced sexual violence. It was rooted not only in myths about women's sexuality but also in the law's focus upon men's experiences and subjectivities. The priority given to these in the substantive law on consent, particularly the question of a defendant's belief in consent, came under severe scrutiny following the House of Lords decision in *Morgan*. Their Lordships held that an honest belief that the victim had consented would lead to acquittal, no matter how unreasonable that honest belief might be. While those defendants' convictions were upheld on the basis that they could not have had an honest belief, the facts involved considerable exercise of force against the complainant as well as her verbal and physical resistance. Notions that absence of consent only existed where there was 'force, fear or fraud' still lingered, with Lord Hailsham accepting 'force' as a requirement of the *actus reus*.¹² Thus the feminist response to *Morgan* extended to scrutiny of the law's myths about consent as a whole, and their effect upon all aspects of the criminal justice system's response to sexual offences, from police treatment of initial reports to judges' sentencing remarks. It encompassed not only cultural attitudes about 'real rape'¹³ but also those myths given the status of law.¹⁴ Thus the outrage which greeted the House of Lords decision in *DPP v Morgan* was not simply at the *ratio decidendi*, problematic as that was, but also at the wider legal and social cultures which informed it.

The reactions to this decision prompted the Home Secretary to establish the Heilbron Committee; its chair, Rose Heilbron QC, was the first woman judge. However, while the Heilbron Report led to important changes in other areas, it did not advocate a change in the

⁹ For example, in the year ending March 2016, 90% of victims of rape and 84% of victims of other sexual offences recorded by police were women: Office for National Statistics, 'Experimental statistics: Victims of police recorded violent and sexual offences', 2017, <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/yearendingmarch2016/experimentalstatisticsvictimsofpolicerecordedviolentandsexualoffences#how-are-victims-and-suspects-of-violent-offences-related> (accessed 26 November 2019).

¹⁰ *R v Camplin* (1845) 1 Cox CC 220.

¹¹ Sjolín cites the 38th (1973) edition of Archbold Criminal Pleading Evidence and Practice, for example, as still including reference to this requirement (Catarina Sjolín, 'Ten Years on - Consent under the Sexual Offences Act 2003' [2015] *Journal of Criminal Law* 20, 20.)

¹² See Lord Hailsham in *DPP v Morgan*, p 210.

¹³ Jennifer Temkin, 'And Always Keep A-hold of Nurse, For Fear of Finding Something Worse': Challenging Rape Myths in the Courtroom' (2010) 13(4) *New Criminal Law Review* 710; Joanne Conaghan and Yvette Russell, 'Rape Myths, Law, and Feminist Research: 'Myths about myths'' (2014) 22 *Feminist Legal Studies* 25.

¹⁴ For example, the legal fiction that a woman gave irrevocable consent to sexual intercourse with her husband on her wedding day, and therefore could not in law be raped by him, survived until 1991: *R v R* [1991] UKHL 12.

legal tests for belief in consent.¹⁵ Nor did it spend a lot of time on the actus reus of consent, but it did review the then-current law and emphasise that there was no longer a requirement of physical force.¹⁶ The Sexual Offences (Amendment) Act 1976 gave effect to some of the Report's recommendations, including that there should be a statutory definition of rape for the first time, emphasising lack of consent rather than violence.¹⁷ Section 1 defined the offence as sexual intercourse 'without consent' where the defendant had been 'reckless' as to consent: in line with the Report's comments, there was no reference to the requirement of 'force, fear or fraud'.

The need for force was finally explicitly rejected in *Olugboja*.¹⁸ In response to defence arguments that force or the threat of force was required to vitiate consent, Dunn LJ asserted that 'every consent involves a submission, but it by no means follows that a mere submission involves consent.'¹⁹ Yet this was a partial and problematic advance in the law. The equation of 'reluctant acquiescence' with consent was very far from a model of positive consent.²⁰ Instead, it drew explicitly upon the model of men's sexuality as active and dominant, women's as passive and requiring 'seduction' into 'submission'. It blurred the lines between persuasion and coercion, cast women who actively sought or encouraged sexual activity as abnormal, and implicitly represented same-sex activity as deviant. In other words, it reaffirmed many of the problematic elements of legal understandings of consent.

4. The Sexual Offences Act 2003: continuing controversies

The development of sexual offences law to this point could be characterised as evolution or, less generously but perhaps more accurately, as a series of piecemeal reforms. On either view, it lacked consistency and clarity not only between offences but also as to its underlying principles. The liberal principles which informed many changes from the Sexual Offences Act 1967 onwards sat uneasily alongside the moralistic elements of the law. Feminist pressure for law reform had not decreased in the years since *Morgan*: on the contrary, both the law and the legal process had come under systematic criticism.²¹ Some feminist MPs who supported reforms had become government ministers following the Labour victory in the 1997 general election.²² Further impetus for systematic reform came from the European Convention of Human Rights. This Convention was incorporated into domestic law by the Human Rights Act 1998, but the European Court of Human Rights had made it clear that the UK's discriminatory laws on sex between men breached the Article 8 right to private life.²³

In response to these varied pressures, the government launched a major review of sexual offences, *Setting the Boundaries*.²⁴ The review set out its basic, liberal principles as non-discrimination, non-interference with consensual conduct, and personal autonomy, subject to the need to protect children and the vulnerable from coercion.²⁵ However, it left some key

¹⁵ Great Britain Advisory Group on the Law of Rape, and Rose Heilbron. *Report of the Advisory Group on the Law of Rape*. 1975.

¹⁶ At paras 18-21.

¹⁷ At para 81.

¹⁸ *R v Olugboja* [1982] QB 323.

¹⁹ At p 332.

²⁰ At p 331. For a summary of 'affirmative consent' models see Wendy Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19 *Feminist Legal Studies* 27, 30.

²¹ Jennifer Temkin, *Rape and the Legal Process* (London, Sweet & Maxwell, 1984); Zsuzsanna Adler, *Rape on Trial* (London, Routledge, 1987); Sue Lees, *Carnal Knowledge: Rape on Trial* (London, Penguin, 1996).

²² For example, the post of Minister for Women created in 1997 was held by Harriet Harman (also Social Security Secretary, and later Solicitor General), Lady Jay (also Leader of the House of Lords), and Patricia Hewitt (also Trade and Industry Secretary) in the period 1997-2003.

²³ *ADT v UK* [2000] ECHR 402, which challenged the criminalisation of acts between men which were not 'in private', narrowly defined as where only two people were present.

²⁴ Sexual Offences Review, *Setting the Boundaries: Reforming the Law on Sex Offences, Vol 1* (London, HMSO, 2000).

²⁵ *ibid* 1.3.

feminist concerns unaddressed. For example, it equated non-discrimination with gender neutrality, an approach with which not all feminists would agree in this highly gendered context.²⁶ For offences whose mens rea included a lack of belief in consent, it recommended that the subjective test of honest belief should remain.²⁷ However, it was to be limited by a requirement that the defendant 'take all reasonable steps in the circumstances to ascertain free agreement'.²⁸ The government, in its White Paper, proposed a test of 'reasonable belief' instead.²⁹ Despite this proving controversial in Parliament, where some legislators continued to favour the subjective test, the more objective approach was adopted in the final Act.³⁰ It avoids the awkward hybrid approach of *Setting the Boundaries* in favour of a simple mens rea requirement of lack of *reasonable* belief in consent.

The 2003 Act therefore abandoned the *Morgan* test. The mens rea for sexual offences including rape (section 1), sexual assault by penetration (section 2), and sexual assault (section 3) is now absence of a *reasonable* belief in consent.³¹ In other words, it is more objective and requires the defendant to have taken appropriate steps to ascertain whether the complainant was consenting. While that contradicts the wider trend in criminal law for mens rea to be subjective, it is surely justified in situations where the means of ascertaining consent are so easily available: the other person can simply be asked.³² However, it still leaves the courts to determine what is reasonable 'in all the circumstances', including which 'circumstances'³³ are relevant: a formulation which allows the courts to import subjective elements, a focus on the complainant's behaviour, and wider social attitudes into the test.

Consent as an element of actus reus also underwent significant reform. For the first time, consent now has a statutory definition. According to section 74, it is 'agreement by choice'; the person must have 'freedom and capacity' to make that choice. This definition aimed to remove all lingering assumptions that consent was present unless 'force, fear or fraud' could be demonstrated. Instead, it was supposed to be a positive (if not necessarily enthusiastic) agreement to the specific act. As *Setting the Boundaries* explained, 'One of the messages that had come to us in consultation was that consent was something that could be seen as being sought by the stronger and given by the weaker. In today's world it is important to recognise that sexual partners are each responsible for their own actions and that there should be parity of status.'³⁴ Yet even this is a rather negative approach to consent, in which partners bear an equal burden rather than sharing equal, positive desire.

Superficially at least, the law on sexual consent has come a long way since *Morgan*. The introduction of a statutory definition of consent as a gender-neutral, positive act rather than a woman's passive submission is a significant advance. However, the definition is broad and the key terms within it were not defined; as Ashworth and Temkin commented, "freedom' and 'choice' are ideas which raise philosophical issues of such complexity as to be ill-suited to the needs of criminal justice".³⁵ Munro has pointed out that 'we all operate with relative rather than

²⁶ See, e.g., Nicola Lacey, 'Beset by Boundaries' [2000] *Criminal Law Review* 3; Mary Heath and Ngaire Naffine, 'Men's Needs and Women's Desires: Feminist Dilemmas About Rape Law "Reform"' (1994) 3 *Australian Feminist Law Journal* 30 at 39-40, 51.

²⁷ Sexual Offences Review, *Setting the Boundaries* 2.13.

²⁸ *ibid* 0.11.

²⁹ Home Office, *Protecting the Public - Strengthening Protection against Sex Offenders and Reforming the Law on Sexual Offences* (London, HMSO, 2002) paras 33-34.

³⁰ House of Commons Home Affairs Committee, 'Sexual Offences Bill: Fifth Report of Session 2002-03' (2003) 8. For an overview of the legislative process, see Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] *Criminal Law Review* 328, 332-334.

³¹ Offences against children are now separate (e.g. sections 9 to 15A), with absence of consent not part of their definition.

³² Andrew Ashworth, *Principles of Criminal Law* (3rd ed, Oxford, Oxford University Press, 1999), pp. 354-5.

³³ Temkin and Ashworth, 'The Sexual Offences Act 2003' 341.

³⁴ Sexual Offences Review, *Setting the Boundaries* 2.10.3.

³⁵ Andrew Ashworth and Jennifer Temkin, 'The Sexual Offences Act 2003 (1): Rape, Sexual Assaults and the Problems of Consent' (2004) *Criminal Law Review* 328 at p 336.

complete sexual freedom', and section 74 tells us little about what *level* of freedom will suffice.³⁶ That has left a lot of room for interpretation not only by the courts, but also by the police and prosecutors who make decisions about whether an offence has occurred and, if it has, whether a criminal prosecution should be brought. Allowing such room for interpretation need not inevitably be a bad thing; after all, we now recognise that consent may be given or refused in a very wide range of situations. As Katerina Sjolín suggests, the courts value the flexibility it brings in 'an area of infinite variety and choice'.³⁷ Unfortunately, that flexibility comes at a cost since this is a field where the impact of cultural myths on all levels of the criminal justice system is profound, pervasive, and well-documented.³⁸

In that context, misinterpretation is probable if not inevitable. 'Agreement', for example, had been suggested in *Setting the Boundaries* to recognise that 'sexual partners are each responsible for their own actions and that there should be parity of status.' Yet the report had immediately qualified this assertion by suggesting that the definition of 'consent' extended from 'enthusiastic agreement to reluctant acquiescence'.³⁹ In courtrooms, the latter suggestion has been seized upon so that 'agreement' is interpreted not as an equal meeting of minds but as a passive concession by one party to the other's active desire. Indeed, that is the approach suggested by the model direction for judges, which advises them to tell juries that '[c]onsent in some situations ... is given with reluctance, but it is still consent'.⁴⁰ It has been elaborated on in courtrooms: in *Bree* [2007] EWCA Crim 804, Judge P said that consent 'extends from passionate enthusiasm to reluctant or bored acquiescence'. Pitchford LJ in *Doyle* drew a distinction between:

... reluctant but free exercise of choice on the one hand, especially in the context of a long term and loving relationship, and unwilling submission to demand in fear of more adverse consequences from refusal on the other.⁴¹

Such an approach is not only a dilution of the model of free and active choice. It is also inherently gendered: there is a long history of the law understanding men as sexually-active seducers, women as the sexually-passive seduced. Women's own desires are downplayed or denied, while men are given considerable licence in their 'pursuit' and 'persuasion' of women into sexual activity. (And if this gendered understanding seems to render same-sex activity aberrant or invisible, that is because it does precisely that.) As Vanessa Munro has argued, the Act fails to recognise how 'entrenched power disparities, material inequalities, relational dynamics, and socio-sexual norms' constrain women's ability to freely say yes, as well as no, to sexual activity with men.⁴²

The further provisions in sections 75 and 76 have done little to help courts in understanding what consent requires. Section 75 sets out a list of circumstances in which consent and reasonable belief in consent are presumed to be absent, although the defendant can put forward evidence that either or both were in fact present. While detailed consideration of these situations is outside the scope of this chapter, it is notable that they generally relate to circumstances where confusion around consent is unlikely in any event: for example, where

³⁶ Vanessa E Munro, 'An Unholy Trinity? Non-Consent, Coercion and Exploitation in Contemporary Legal Responses to Sexual Violence in England and Wales' (2010) 63 *Current Legal Problems* 45, 52.

³⁷ Katerina Sjolín, 'Ten years on: consent under the Sexual Offences Act 2003' [2015] *Journal of Criminal Law* 20 at 27.

³⁸ For recent discussions see Jennifer Temkin, Jacqueline M Gray and Jastine Barrett, 'Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study' (2016) *Feminist Criminology* 1; Katrin Hohl and Elisabeth Stanko, 'Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales' (2015) 12(3) *European Journal of Criminology* 324.

³⁹ Sexual Offences Review, *Setting the Boundaries*, 2.10.3.

⁴⁰ Judicial College, *The Crown Court Compendium*, vol 1 (London, Judicial College, 2017) 20-17.

⁴¹ *R v Doyle* [2010] EWCA Crim 119.

⁴² Vanessa E Munro, 'Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy' (2008) 41 *Akron Law Review* 923, 925.

there has been use of stupefying drugs, violence or threats of violence, or where the complainant was unconscious. Section 76 states that there is no consent or reasonable belief in consent where there has been deception either as to the defendant's identity or as to the nature or purpose of the act. It is narrow in scope (for example, the identity provision applies only where the defendant impersonated someone personally known to the complainant) and the courts have preferred to deal with most cases under section 74's general test instead. Combined with procedural issues in using these presumptions, they raise the question of whether there is now implicitly a hierarchy of consent, with cases outside the statutory scenarios somehow more borderline or less serious than those within.⁴³

The superficial appeal of a simple statutory definition is thrown into question when it is applied to difficult cases. Before considering two situations which have generated controversial caselaw and important policy questions, it is worth considering a third type of scenario which has not been tested in the appeal courts. What if A does not want to engage in sexual activity with B, but agrees to do so in order to gain some benefit or avoid some disadvantage? For example, A performs fellatio on her husband B to avoid an argument in which he will get angry and verbally abusive. Or A performs fellatio on her manager B in order to gain a promotion. Or A performs fellatio on her manager B in order not to lose her job. Has A consented in any or all of these situations?⁴⁴ She has certainly not given enthusiastic consent; but that is not what the law requires. She did agree by choice in the most literal sense, but did she have 'freedom' in all three cases to make that choice? Which, if any, should be criminalised and why? It is not just that the dividing line between free consent and non-consent is difficult to draw precisely; there is not even agreement as to the broad neighbourhood within which that line should be drawn.

4.1 Capacity and intoxication

While the courts have only considered whether there is 'freedom' in such scenarios briefly and hypothetically, they have had to engage in practice with the question of 'capacity' in the context of drunken consent. Since section 74 defines consent as requiring the capacity to make a choice, at what point will voluntary alcohol (or drug) consumption take away that capacity? If the complainant were wholly unconscious, then clearly there could be no consent (and indeed a section 75 presumption would apply). However, as the leading case of *Bree* acknowledged, 'capacity to consent may evaporate well before a complainant becomes unconscious'.⁴⁵ Yet determining when that point is reached has posed considerable difficulties. The practical problem of distinguishing between drunk-but-competent and conscious-but-incompetent is further complicated by two underlying ideas. One is that drunk complainants are contributorily negligent, an attitude now disavowed by the courts but still enjoying cultural currency.⁴⁶ The other is that criminalising sex with drunk women would be a paternalistic restriction of their sexual agency. The court in *Bree* expressed the latter point as a concern about 'patronising interference with the right of autonomous adults to make personal decisions for themselves'.⁴⁷ Unfortunately, in sidestepping the question of *when* intoxication undermines that autonomy, it left legal space for juries to draw upon the former idea.

⁴³ Temkin and Ashworth, 'The Sexual Offences Act 2003' 336.

⁴⁴ *Setting the Boundaries* suggested that there was no consent in the third situation but not the second (2.10.9). For further discussion of similar scenarios, see Susan Leahy, "'No Means No', But Where's the Force? Addressing the Challenges of Formally Recognising Non-Violent Sexual Coercion as a Serious Criminal Offence' (2014) 78 *Journal of Criminal Law* 309.

⁴⁵ *R v Bree* [2007] EWCA Crim 804 para 34. See further Phil Rumney and Rebecca Fenton, 'Intoxicated Consent in Rape: *Bree* and Juror Decision-Making' (2008) 71 *MLR* 279.

⁴⁶ Including among police officers: Kayleigh A Parratt and Afroditi Pina, 'From "Real Rape" to Real Justice: A Systematic Review of Police Officers' Rape Myth Beliefs' (2017) 34 *Aggression and Violent Behavior* 68. More generally, see Emily Finch and Vanessa E Munro, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26 *Legal Studies* 303.

⁴⁷ At paragraph 35.

The courts have responded to the uncertainty by setting the bar for capacity surprisingly low, on somewhat questionable grounds. In an unreported 2005 case, a student so drunk that bar staff asked a security guard to escort her to her room remembered lying in the corridor while he had sex with her; her evidence was that she had not consented but could not remember the whole incident. However, the judge directed an acquittal without considering whether she had capacity, stating that ‘drunken consent is still consent.’⁴⁸ The teenage complainant in *H* was very intoxicated but, as Clare McGlynn has pointed out, prosecution witnesses and defence counsel suggested that she retained capacity to consent because she was still speaking and walking.⁴⁹ In *Bree* itself, the accused had looked after the complainant while she was repeatedly sick in the shower and sometimes unconscious. She woke up later to find he was having sex with her. Because the trial judge offered no specific guidance on the effect of intoxication upon consent, the Court of Appeal quashed the conviction. Nonetheless, rather than offering its own guidelines, the appeal court insisted that section 74 ‘sufficiently addresses the issue of consent in the context of voluntary consumption of alcohol by the complainant’ through its reference to capacity.⁵⁰ Jury guidance is to depend upon the facts of the case, offering a level of discretion to judges which may cause concern. The Court of Appeal itself worryingly suggested that consent encompasses ‘reluctant or bored acquiescence’.⁵¹ It also drew an analogy between intoxicated complainants and intoxicated defendants which ignored that consent can, as we have seen, be passive while intention is an active state of mind related to physical actions. The comparison also appears to reintroduce the inappropriate notion of defendants’ responsibility for their actions being mitigated by victims’ ‘contributory negligence’.⁵²

4.2 Freedom, fraud, and common sense

In the subsequent case of *Kamki*, the Court of Appeal approved the trial judge’s direction inviting the jury to use ‘common sense’.⁵³ Common sense might seem a sensible basis for a jury decision: it is something which the courts assume that jurors understand and are able to apply. However, common sense is in reality far from neutral, and at its worst can be a euphemism for bias or prejudice. More generally, it involves an implicit appeal to gender norms; in many of the reported cases, it is grounded in stereotypical expectations of young women’s behaviour. It is therefore both unsurprising and of great concern that this term is also central to the courts’ approach to fraudulent consent. Acknowledging the difficulties this area raises, Leveson LJ nonetheless asserted in *McNally* that ‘the route through the dilemma’ was to approach it in ‘a broad commonsense way’.⁵⁴ The results are profoundly problematic. Put simply, if I mislead someone into thinking I have male genitals when I do not, then their consent to sexual activity (even if it does not involve my genitals) is likely to be legally void; but if I am an undercover state agent who lies about my job, politics, age, personal and marital situation, and motives for associating with the complainant, their consent is nonetheless valid.

In the latter situation, prosecutors have not even brought the cases before the criminal courts. That is despite some of the relationships lasting for a number of years and resulting in the

⁴⁸ *R v Dougal* (Swansea Crown Court, unreported; *Guardian*, 24 November 2005).

⁴⁹ *R v H* [2007] EWCA Crim 2056; Clare McGlynn, ‘Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?’ in Clare McGlynn and Vanessa Munro (eds), *Rethinking Rape Law: international and comparative perspectives* (London, Routledge, 2010) 149.

⁵⁰ Paragraph 36.

⁵¹ Paragraph 22.

⁵² Shlomit Wallerstein, ‘“A drunken consent is still consent” – or is it? A critical analysis of the law on a drunken consent to sex following *Bree*’ [2009] *Journal of Criminal Law* 318, 323-329; Temkin and Ashworth, ‘The Sexual Offences Act 2003’.

⁵³ *R v Kamki* [2013] EWCA Crim 2335. For juror ‘common sense’ and capacity, see E. Finch and V. E. Munro, ‘Breaking Boundaries? Sexual Consent in the Jury Room’ (2006) 26 *Legal Studies* 303, 314-315.

⁵⁴ *McNally v R* [2013] EWCA Crim 1051.

birth of children;⁵⁵ one allegedly ended only when the woman escaped to a refuge.⁵⁶ However, a judicial review of the decision not to prosecute the police officer concerned was brought by one of the deceived women.⁵⁷ Known as 'Monica', she was one of a number of women political activists who had relationships with men they subsequently discovered to be undercover police officers. In 1997 Monica, an environmental activist, had had a six-month relationship with a fellow member of 'Reclaim the Streets' and hunt saboteur, Jim Sutton. Only in 2011 did she find out that he was in fact DC Andrew Boyling. Monica emphasised that had she been aware of that, she would not have entered into the relationship. Nonetheless, the High Court accepted that there was valid consent since the deception was not sufficiently 'closely connected to the performance of the sexual act'.⁵⁸

Other situations have been recognised as criminal only where highly coercive in nature. Thus in *Jheeta*, the court distinguished the defendant's elaborate deception from 'common or garden lies'⁵⁹ primarily because it involved a threat of criminal prosecution if the complainant did not have sex with the defendant. A later case, *Devonald*,⁶⁰ suggested a broader approach, but was disapproved in *Bingham*.⁶¹ *Devonald* had impersonated a young woman online in order to get his daughter's ex-boyfriend to masturbate in front of a webcam; the Court of Appeal accepted that there had been deception as to the purpose of the act (revenge rather than sexual gratification). *Bingham* undertook a similar kind of deception, impersonating other men online in order to get his girlfriend to pose topless, then using the recordings to blackmail her into performing sexual acts on webcam. However, the Court of Appeal now held that it did not fall within section 76 as sexual gratification might also have been one of the purposes, even if not the main one. Hallet LJ was concerned to limit the scope of section 76 because, as it conclusively presumed a lack both of consent and of reasonable belief in consent, it 'removes from an accused his only line of defence'.⁶² The issue of consent was therefore to be considered under the general definition in section 74.

By contrast, where there has been deception as to gender, prosecutions and convictions have followed.⁶³ The Court of Appeal considered the legal issues in *McNally* and concluded that it was clearly 'common sense' that deception as to gender must vitiate consent while other identity deceptions would not.⁶⁴ By labelling it a matter of common sense, the court ensured that this reasoning did not have to be explained. They might have found some difficulty in doing so. For example, why was it obvious that gender fraud vitiated consent to digital penetration (as occurred in *McNally*)? Why are female fingers so fundamentally different to male fingers that an extremely serious offence is committed, while the fingers of a deceptive police officer are so similar to those of an honest activist and political comrade that no offence occurs at all? In either case, the physical act is the same and uses the same body parts; the difference is the person to whom those body parts are attached. The emotional effects upon the complainant is similar in each case, although compounded in the latter by state collusion.

⁵⁵ Carole McCartney and Natalie Wortley, 'Under the Covers: Covert Policing and Intimate Relationships' [2018] *Criminal Law Review* 137.

⁵⁶ McCartney and Wortley, 'Under the Covers' 150.

⁵⁷ *R (on the application of 'Monica') v Director of Public Prosecutions* [2018] EWHC 3469 (QB).

⁵⁸ At para 80. Although the pre-2003 law applied to *Monica*, the Court of Appeal also considered what the position would be under the current law. The use of undercover policing, including the issues raised by these relationships, is at the time of writing the subject of the Undercover Policing Inquiry (<https://www.ucpi.org.uk/>).

⁵⁹ *R v Jheeta* [2007] EWCA Crim 1699, paras 23-24.

⁶⁰ *R v Devonald* [2008] EWCA Crim 527.

⁶¹ *R v Bingham* [2013] EWCA Crim 823.

⁶² Para 20.

⁶³ As well as *McNally* (below) and *Gayle Newland* [2016] All ER (D) 85, there were gender deception convictions in the unreported cases of *Gemma Barker* (5 March 2012, Guildford Crown Court), *Kyran Lee (Mason)* (16 December 2015, Lincoln Crown Court), and *Jennifer Staines* (24 March 2016, Bristol Crown Court).

⁶⁴ *R v McNally (Justine)* [2013] EWCA Crim 1051.

Monica and *McNally* mean that someone who engaged in sexual activity with a 'man' who was anatomically a woman is likely to be considered the victim of a crime, yet someone who engaged in sexual activity with a fellow activist who was actually a police spy will not. To reach this result, the courts import a number of gendered assumptions into their 'common sense' interpretation of the facts. These assumptions include that normative heterosexual sex is intrinsically more desirable than sex with a trans person or someone of the same sex: kissing a woman whom one believes is a man is unthinkable to the courts, yet kissing a poor man who has lied thoroughly enough about enough aspects of their life to convince their partner that they are wealthy is not. Belying the apparent gender neutrality of current sexual offences law, this approach also assumes that there is a male prerogative – not acquired by trans men – to enjoy considerable latitude in 'seduction', which can encompass serious lies about their identity and beliefs.

A shift of perspective would profoundly alter the legal outcomes. It would not gloss over men's culpability in favour of requiring women to establish that they suffered coercion exceeding those prerogatives. What happens if we do not take masculine deception as a given in sexual relationships, but instead ask whether there is justification for the deceit? As Amanda Clough points out, '[i]t is for the accused's gain, and only their gain, if the reason for non-disclosure is that they are fully aware that the victim would be unlikely to consent if they knew the truth.'⁶⁵ That would mean there would be no legally valid consent in many undercover policing cases,⁶⁶ but would prompt more nuanced considerations in those gender fraud cases where the defendant was confused or conflicted about their gender or was trans. In other words, it could significantly shift the current legal 'common sense'.

Finally, the mens rea requirement of a lack of 'reasonable belief' in consent allows a further opportunity for bias, norms and assumptions to be imported into the process of determining guilt. The jury is allowed a wide margin of discretion not only in assessing what is 'reasonable', but also through the statute's invitation to do so in 'all the circumstances'. Rape myths continue to influence jurors, and that poses dangers which begin long before a case reaches the courtroom. In assessing its credibility and prospects of success, the police and Crown Prosecution Service attempt to predict the reactions of jurors to the evidence. In doing so, they are likely to draw upon not only the likely biases of jurors but also their own. Common sense and resort to the reasonable person, then, work hand in hand with the other flaws in the criminal justice system to ensure that rates of prosecution and conviction for sexual offences remain troublingly low.⁶⁷

5. Is consent adequate at all?

Underlying these issues is the question of whether consent is an adequate or appropriate concept for establishing the borderline between lawful and criminal sexual acts. For some commentators including Jonathan Herring it could be, but we need 'a rich sense' of what it means.⁶⁸ He argues that a person mistaken about a fact who would not have consented had she known the truth does not in fact consent. If the accused knew or ought to have known that

⁶⁵ Amanda Clough, 'Conditional Consent and Purposeful Deception' (2018) 82 *Journal of Criminal Law* 178, 186.

⁶⁶ At the time of writing, the Covert Human Intelligence Sources (Criminal Conduct) Bill is before Parliament. It would allow intelligence sources including police officers to be authorised to commit crimes including sexual offences. Thus, this issue may at first glance appear potentially redundant; on the contrary, it will be equally if not more important should the Bill become law in order to ensure that proper scrutiny and formal authorisation are required before such sexual conduct can take place.

⁶⁷ There is an extensive literature on the shortcomings of the criminal justice system in relation to sexual offences: for a comprehensive examination, most of which remains sadly pertinent, see Liz Kelly, J Lovett and L Regan, 'A Gap or a Chasm? Attrition in Reported Rape Cases' (2005). For mock jury research showing the continuing expectation of violent force, resistance, and physical injuries, see Louise Ellison and Vanessa E Munro, 'Better the Devil You Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17 *Evidence & Proof* 299.

⁶⁸ J. Herring, 'Mistaken Sex' [2005] *Crim LR* 511.

she did not consent, then an offence has been committed. The latter element makes Herring's interpretation less drastic than some critics have argued, since the (perhaps idiosyncratic) priorities of the complainant do not alone determine liability. The accused must either have actually known, or ought to have known, that consent depended upon the particular issue, but chosen to deceive her anyway. That objective standard is unlikely to be reached if a condition was both undisclosed and unusual. However, while it gives greater protection to people's autonomy, it does not fully resolve the issues around fraudulent consent. In particular, the assumption that an accused ought to have known their genital sex was determinative of consent is already at the heart of cases such as *McNally*. A richer understanding could, though, return attention to the deceptions which arguably most concerned the complainants in the gender fraud cases: not the gender of their partner so much as the prolonged deceptions about their identity or identities and the many details of their lives and personalities which were deliberately misrepresented. In another gender fraud case, for example, the accused was originally reported to police not because of deception as to gender (which had not yet been discovered) but because they had pretended to be three or more different people including the boyfriends of both her and her best friend.⁶⁹

Others suggest that consent is not wrongly defined but fundamentally inadequate.⁷⁰ In terms of its practical operation, it is criticised for focusing attention upon the behaviour of the complainant rather than the accused. Did she act in ways which might have implied that she did consent? Did she adequately convey her lack of consent? While the semi-objective *mens rea* now limits the assumptions a defendant can legitimately make, it by no means eliminates them. He can still rely upon a mistaken belief as long as it is deemed to be reasonable in all the circumstances – and those circumstances presumably include the conduct of the complainant.⁷¹

However, the issues are also more fundamental. For Catherine MacKinnon, consent-based offences falsely assume a social context in which women have equality of power and free exercise of choice, when in reality there is an 'underlying structure of constraint and disparity'.⁷² Its equation of apparent consent with an exercise of autonomy is therefore false: too often, women's apparent consent is rather submission for the sake of survival.⁷³ We have seen that impoverished version of consent accepted by the criminal courts as adequate for women in cases such as *Bree*. Given their attachment to this model, would they really be able to implement a more radical and demanding model of free agreement?

John Gardner makes the opposite argument: that consent *necessarily* presupposes asymmetry between the (male) doer and (female) sufferer.⁷⁴ It therefore does not encompass agreement or teamwork as a model for sex. In other words, the notion of consent is incompatible with full sexual autonomy for women. Yet, while that is indeed the current model of consent, need it be the case? Or is mutual consent a possibility? If so, we return to the question: is it one which the law is able to accommodate? We might point to other fields of law to suggest that an asymmetrical model is not inevitable: contract law, for example, requires offer and acceptance. Yet the very fact that these are complicated by recognition of counter-offers, invitations to treat, and so forth shows that the roles of offeror and acceptor are neither

⁶⁹ *Gemma Barker*. See further Caroline Derry, *Lesbianism and the Criminal Law: Three centuries of regulation in England and Wales* (Basingstoke, Palgrave, 2020) chapter 8.

⁷⁰ For an overview of the key challenges to liberal conceptions of consent, see Munro, 'Constructing Consent' pt II.

⁷¹ Temkin and Ashworth, 'The Sexual Offences Act 2003' 341.

⁷² Catherine MacKinnon, *Towards a Feminist Theory of the State* (Cambridge MA, Harvard University Press, 1989) 175.

⁷³ MacKinnon, *Towards a Feminist Theory*, 168.

⁷⁴ John Gardner, 'The Opposite of Rape' (2018) 38 *Oxford Journal of Legal Studies* 48.

fixed and binary, nor readily mapped onto active and passive roles. Unfortunately, the criminal law shows little willingness to discard its binary assumptions in relation to sexual consent.

Hunter and Cowan summarise critiques of consent's inability to recognise women's agency from several angles. On one hand, women may be treated as irrational victims: their autonomy and decision-making capacity is not recognised so their (non-)consent is not respected. On the other, women may be treated as masculine, atomised subjects with no account taken of the structural inequalities which limit their autonomy and decision-making capacity: constraints on their ability to (not) consent are then not recognised. In other words, liberal notions of consent may tie women into the roles of victim or agent, with little space for intermediate positions.⁷⁵ The problem is not simply this imposition of a victim/subject binary. As Louise du Toit points out, the underlying issue is liberalism's model of the self as 'pre-existent and complete' rather than 'dynamic and intersubjective'.⁷⁶ In other words, we form our sense of self through time and through our interactions with others: the law both fails to understand that when considering consent and does not take seriously the damage rape does to that process of forming sexual selfhood. It will remain unable to do so, du Toit argues, since the asymmetry between the active male and passive female – and the notion of women's sexuality as men's property – are so entrenched in criminal law.⁷⁷

However, if consent is inadequate, does that mean we should abandon it?⁷⁸ If so, what should take its place? There is no consensus on what an alternative might look like. One ambitious possibility is du Toit's suggestion that we need to resymbolise 'feminine sexuality as inappropriatable, inviolable'. That would involve, among other measures, reminding judges and juries about women's struggles to maintain sexual agency and ensuring they understand the damage rape does to the victim's dynamic selfhood.⁷⁹ But are such proposals too utopian in a system where even cautious changes have been undermined and resisted by the criminal justice system?

Conversely, other critics of consent move in the opposite direction to suggest that we should move back towards a requirement of force. Victor Tadros argued in 'Rape Without Consent' that the consent requirement fails to mark rape as a crime of violence.⁸⁰ For him, the answer is a differentiated definition which, rather than centring on consent, focuses upon the particular wrong done. For example, he suggests that where force is used, it is 'a significant feature of the wrong perpetrated'.⁸¹ That would seem to further imply a relatively high degree force would be required; while it is not clear what other circumstances would be classed as rape under this scheme, there are strong echoes of the Victorian 'force fear or fraud' albeit that he also mentions some other situations such as unconsciousness and involuntary intoxication. How, without a single underpinning concept, is such a scheme to avoid being under-inclusive? In other words, removing the difficulties in this area of sexual offences law is unlikely to be as simple as removing the element of consent.

6. Conclusion

The past half century has seen a transformation in sexual offences law. Both the fact of consent and the accused's belief in consent have been given new statutory definitions which aim to address at least the most egregious failings of the old law. To some extent, they have

⁷⁵ Rosemary Hunter and Sharon Cowan, 'Introduction' in Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist engagements with law and subjectivity* (London, Routledge-Cavendish, 2007).

⁷⁶ Louise du Toit, 'The Conditions of Consent' in Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist engagements with law and subjectivity* (London, Routledge-Cavendish, 2007).

⁷⁷ du Toit, 'The Conditions of Consent' 68.

⁷⁸ Victor Tadros, for example, makes this argument in 'Rape Without Consent' (2006) 26(3) *Oxford Journal of Legal Studies* 515.

⁷⁹ du Toit, 'The Conditions of Consent' 70–71.

⁸⁰ Tadros, 'Rape Without Consent' 515–516.

⁸¹ Tadros, 'Rape Without Consent' 539.

succeeded in this. The *Morgan* defence would no longer be arguable; nor would *Olugboja*'s defence argument that failure to physically resist legally equated to consent. Section 74 of the Sexual Offences Act 2003 put that changing understanding on a statutory footing. It seems evident that in law, consent requires something more than a mere absence of resistance.

Yet there has been little sign of a corresponding transformation in the implementation of those definitions. Successful prosecutions remain more likely where there is evidence of the use of force.⁸² The acceptance that a woman who is vomiting in a shower, or so intoxicated that she cannot be allowed to walk through campus alone, can 'agree by choice' shows that the courts' understanding of positive consent is a weak and thin one. It is partly for this reason that Vanessa Munro has argued that the force requirement has not disappeared; although no longer part of the legal definition of rape, its use is important evidence to support a woman's allegation.⁸³ Men's prerogative to 'seduce' extends to police spies who lied about every aspect of who and what they were, in the context of long-term relationships; yet the courts have been eager to take punitive action against (presumed) women who attempt to exercise similar prerogatives. It is difficult, then, to avoid the conclusion that while feminist activism helped to inform statutory change, similar transformations of understanding remain elusive in the police stations, prosecution offices, and courtrooms of England and Wales.⁸⁴

Should feminists disengage from law reform altogether? Rather, Larcombe argues that we should work towards qualitative, victim-centred aims. One of these, 'improving the legal 'story' of rape' so that myths and stereotypes are not reinforced by the legal system,⁸⁵ will require the issues around consent considered in this chapter to be addressed in a way which the law has not yet achieved. The experience of the last fifty years demonstrates that changing the legal story is a slow and difficult process, which cannot be achieved by statutory reform alone. Yet it is essential if the law is to truly recognise the sexual agency of all those it governs. At present, it only fully recognises the sexual agency of heterosexual men, which leaves the rest of us with little role beyond accepting or refusing their demands. In order to transform that, we must continue to effect change 'slowly, and often imperceptibly',⁸⁶ until the courts embrace 'agreement by choice' as a *mutual* agreement between equals rather than the reaction of the sexually passive to a binary choice between submission and resistance.

⁸² Munro, 'Constructing Consent'.

⁸³ Munro, 'An Unholy Trinity?'

⁸⁴ Sjolín ('Ten Years On') suggests that to criticise the courts for 'harking back' is 'a lazy criticism' and that instead, they are avoiding interference with the statutory definition and preserving flexibility. However, the cases discussed here do not wholly bear out that more generous interpretation: the judicial approach combines with police, CPS, and jury attitudes to ensure that older understandings of consent persist.

⁸⁵ Larcombe, 'Falling Rape Conviction Rates' 39.

⁸⁶ McGlynn, 'Feminist Activism' 150.

Beyond the Courtroom

Chapter 10

The Jurisprudence of Mediation

Julian Sidoli

Abstract

This chapter provides a theoretical account of mediation - a process of dispute resolution that has grown significantly over the past 50 years. It argues that there are three central theoretical models – the pragmatic, the transformative and the narrative, with all other models being ultimately iterations of the latter. The chapter then discusses what various theorists argue are the fundamental features or qualities of mediation. These features include privacy and informality. The chapter concludes by arguing that, in fact, only voluntariness and autonomy, bottom-up justice, and plurality are central to a true jurisprudence of mediation.

1. Introduction

The last 50 years can be seen as telling a story of the slow but steady growth of alternative dispute resolution. The birth and subsequent growth of mediation takes place over similar timescale both intellectually and in practice.¹ It grew from the mid 1960s onwards through a series of statutes establishing conciliation schemes operating in the industrial and employment sectors.² This was followed by the Trade Union and Labour Relations Act 1974 which a year later set up what became known as Advisory, Conciliation and Arbitration Service (ACAS). Conciliation was, and remains for ACAS, what the rest of the legal and dispute resolution world usually calls mediation. A process where a neutral third party facilitates the reaching of a voluntary agreement or settlement between the parties.

What follows is not a history of mediation (there are many useful historical overviews)³ but rather a detailed account of the jurisprudence of mediation. This is not a straightforward task. Mediation has drawn widely from many disciplines.⁴ Despite this intellectual borrowing, or perhaps because of it, there remain relatively few, if any, clear and consistent foundational theories with regards to mediation. Indeed, mapping the conceptual ground of mediation appears to be very much a work in progress as there appears to be no agreed schema. For

¹ The 'father' of mediation, Lon L Fuller's seminal book *The Concept of Law* was published in its final, revised edition in 1969, his 'Mediation – Its Forms and Functions' (1979) 44 *Southern California Law Review*, 305 followed in 1973.

² For example, the Redundancy Payments Act 1965 and the Industrial Relations Act 1971.

³ For example, see Marian Liebmann, (ed) *Mediation in Context* (London, Jessica Kingsley Publishers, 2000).

⁴ Carrie Menkel-Meadow, 'Mothers and Father of Invention: The Intellectual Founders of ADR' [2000] 16, 1 *Ohio State Journal on Dispute Resolution* 1.

example, Menkel-Meadow⁵ derives eight models of mediation from existing literature whilst Boulle⁶ recognises four models and Alexander describes six 'meta-models'.⁷

This chapter will not attempt a complete literature review of works claiming to offer theoretical insight into mediation. Partly because this is an unwieldy task but also because a survey will leave as many questions unanswered as answered. Rather this chapter will attempt to evaluate the principal strands and themes in order to arrive at what is argued to be foundational in mediation theory: identifying what separates it conceptually from both litigation and other forms of adjudicative alternative dispute resolution (ADR) such as arbitration or statutory adjudication.⁸ It will be argued that there are three key theoretical models – the pragmatic, the transformative and the narrative. The chapter will further argue that other so-called models – like the therapeutic – are more properly classified as versions of one of the former. All three predominant models appear to share a number of key features – the privacy of the process, the informality of the process, voluntariness, the bottom-up nature of justice and finally an appeal to a form of pluralism. The chapter will argue that only the latter three aspects – voluntariness and autonomy, bottom-up justice and plurality – are necessary features of all models of mediation. Although voluntariness matters only in the more limited sense of compulsion within mediation as opposed to compulsion to mediate.⁹ These key aspects of mediation echo many of the cultural and intellectual changes of the past 50 years.

This chapter will begin by outlining the claims of Fuller who considered mediation to be a particular form of social ordering ideally suited to polycentric disputes. It will then provide an account of the three models of mediation – the pragmatic, the transformative and the narrative. Following this, analysis partly drawn from Alberstein,¹⁰ will seek to argue that, quite apart from any wider cultural or intellectual trends, mediation theory has not developed in a vacuum but can be clearly located within the wider contours of litigation and dispute resolution. Having established that mediation - irrespective of model - sits intellectually in a relationship with formal law, the chapter will consider four questions in relation to each of the three models. The first of the four questions focuses on the privacy of mediation. This is often assumed to be fundamental to mediation, but it will be argued that this is not a necessary feature of it. This will lead to the second question of whether or not mediation is necessarily informal. It will be argued that informality is not a core feature of mediation at a theoretical level. The third question will consider the need for voluntariness and autonomy for the actual parties to the dispute. Fourthly, the concept of justice in mediation will be considered. It will be argued that mediation appeals to a 'bottom up' justice or a horizontal (as opposed to a vertical) approach and that questions of its privacy and informality will be considered but it will be argued that neither of those are unique to mediation or essential to the theory as opposed to the practice of mediation. This leads to a discussion of the plurality that I argue underpins mediation and which sits very comfortably in the diversity of contemporary United Kingdom.

This chapter will argue that mediation appeals to an alternative account of justice and ultimately mediation appeals to a pluralistic paradigm, both descriptively and normatively. The degree of pluralism can vary between accounts. Pluralism in mediation embraces - especially in its more evaluative form – not just a recognition of overt legal rights but also of other

⁵ Carrie Menkel-Meadow, 'The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices' [1995] *The Negotiation Journal*, 217, 228-230.

⁶ Laurence Boulle, *Mediation: Principles, Process, Practice* (2nd edn, London, Lexis Nexis Butterworths, 2005).

⁷ Nadja Alexander, 'The Mediation Meta-Model: Understanding Practice' [2008] 26, 1, *Conflict Resolution Quarterly*, 97.

⁸ For example, construction adjudication under the Housing Grants, Construction and Regeneration Act 1996 or deposit protection adjudication under the Housing Act 2004, ss212-215 as amended by the Localism Act 2011, s184.

⁹ See also Julian Sidoli del Ceno 'The Problem of Compulsory Mediation: Civil Justice, Human Rights and Proportionality' (2014) 6, 3, *International Journal of Law in the Built Environment*, 286.

¹⁰ Michal Alberstein, (2009) *Forms of Mediation and Law: A Jurisprudence of Mediation*, ExpressO, http://works.bepress.com/michal_alberstein/1 (accessed 16 December 2020).

conceptions of justice and views of 'the good' is a strength and not a weakness. Finally, it will be argued that the final core element of mediation is based around the argument that litigation is harmful generally to most parties and that mediation seeks to limit this - and that whilst talk of positive experiences of conflict might be flights of fancy – there is a genuine attempt at preserving relationships and, in some sense, healing.

2. Social Ordering and Litigation

Fuller in many important papers during the course of the latter half of the twentieth century outlined an account of how functioning society ought to be governed, or perhaps more appropriately ordered for there is no necessity for 'ordering' always to be 'top-down' or pyramidal. This project that he called 'eunomics' (literally 'good order' frequently referred to by Summers and others as the 'principles of social order')¹¹ did not develop in a systematic way and was left incomplete at his death in 1978. Winston gathered these elements of Fuller's work - which have received less critical attention than his more overtly jurisprudential work - together for a wider readership¹². The basic argument running through this project is that there are many ways in which we can and do order society and human interactions. Adjudication is one of them but only one of them along with managerial direction, contract, legislation, and mediation. Adjudication is appropriate in many arenas but has its limits. Most notably, Fuller considered adjudication to be poorly suited to polycentric disputes¹³ and coordinating collective activities. Fuller borrowing the term 'polycentric' from Polanyi¹⁴ used it to describe disputes with not only multiple parties - that the courts clearly can and do deal with (the 'class action' in the US context for example) - but disputes with a wide variety of participants. Participants (or stakeholders) are those with an interest in the dispute not necessarily a legal interest or right and who tend to represent numerous different perspectives, values, and interests.¹⁵

The question of polycentrism is a complex one¹⁶ and not fundamental for the present enquiry. What is more important and central to the subsequent discussion is that Fuller also argues that not all forms of social order require external authority. He states that this tendency is a 'modern thought.'¹⁷ Fuller regards mediation properly understood not as something that aims to achieve conformity with external norms under the aegis of authority – state or otherwise but rather 'toward the creation of the relevant norms themselves'.¹⁸ Further, Fuller sees the State as being perceived erroneously as the font of all truth, that individuals cannot operate through custom, reason and other traditional mechanisms but must instead be subject at every turn to the courts or the civic authorities:

Now the tendency is to convert every form of social ordering into an exercise of the authority of the state, or, among sociologists, into a projection of "norms" by an abstract entity called "society". Legislation, adjudication, and administrative direction, instead of being perceived as distinctive interactional processes, are all seen as unidirectional exercises of state power.¹⁹

¹¹ Robert Summers, *Lon L. Fuller* (London, Edward Arnold, 1984)

¹² Lon L Fuller & Kenneth I. Winston, *The Principles of Social Order: Selected Essays of Lon L. Fuller Edited, with an Introduction by Kenneth I. Winston.* (Durham N.C., Duke University Press, 1981).

¹³ Polycentrism is a term used to describe an organising principle based around 'many centres'. In dispute resolution its meaning has adapted to mean that there are many participants to the dispute or a dispute with many central issues.

¹⁴ Michael Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (Chicago: University of Chicago Press, 1951).

¹⁵ Lon L Fuller, 'The Forms and Limits of Adjudication' [1978] 92 *Harvard Law Review* 353, 394-5.

¹⁶ See, for example, John WF Allinson 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' [1994] 53, 2, *Cambridge Law Journal* 367.

¹⁷ Lon L Fuller, n1 above at 315.

¹⁸ *ibid* at 308

¹⁹ *ibid* at 339

It is this idea that provides the most useful building block for a jurisprudence of mediation. Mediation does not appeal *per se* to the power of the state or to external legal principles. Evaluative mediators may frequently make reference to the 'law' or what a tribunal might find on the facts but these are arguably not true to the concept of mediation and certainly they are not fundamental to the theory of mediation. Rather, mediation provides avenues for disputes to be dealt with without reference *per se* to external sources of authority. Individuals can be sources of their own 'personalised authority'.

However, tensions between 'mediation as suitable for polycentric disputes' and 'mediation as personalised authority' can clearly be seen. Fuller's work here is – like elsewhere – a rich source of ideas but one which has not been fully or systematically developed. There are clear implications in Fuller's work that some disputes are suited to mediation and that litigation is not necessarily the most appropriate and certainly not the only form of dispute resolution. Implicit in this is that mediation has an internal logic and coherence but that this logic is perhaps rather narrow, confined, and separate. Following Fuller many versions and models of mediation have developed. Fuller's contention that there is one logic of mediation is questionable. Numerous models of mediation have emerged since Fuller; each attempting to provide a different account of the essence of the practice - some placing mediation conceptually close, if different in practice, to negotiation and litigation with the aim being an outcome. Others have concentrated more on the second aspect of Fuller's project, that of recognising or creating other forms of authority. This is taken to its most extreme, or fullest, in narrative mediation where participants are encouraged to create their own account both of the dispute and of the resolution through an appreciation of sometimes radical subjectivity.²⁰ What follows is a brief account of the prevalent models of mediation focussing solely on their theoretical aspects. Each model reveals its jurisprudential commitments at a deeper level of theoretical analysis. It will be argued that Fuller's central contention – that there are a number of ways of properly ordering society – remains a valuable insight.

3. Models of mediation

As mentioned earlier there is no agreed conceptual account of mediation. Neither is there an agreed account of the type or number of models of mediation. This section will argue that there are four principal models of mediation theory. It will not address issues of models of mediation in practice although there is some overlap between the theory and practice of the discipline.

3.1 Pragmatic mediation

Pragmatic mediation aims to reach an agreed settlement between the parties without coercion. The pragmatic model is concerned with 'Getting to Yes' as expressed by Fisher and Ury.²¹ Many appear to take the publication of this book as marking a sea-change in attitudes towards ADR generally although earlier works such as Smith could possibly lay claim to this title too.²² What predominantly matters on this model is reaching an agreement, an agreement that is 'win-win' or of a certain quality for both parties but nonetheless an agreement, a settlement. Pragmatic mediation can often be seen as a development of negotiation, negotiation with the addition of a third party who assists in opening channels of communication. How pragmatic mediation is described can vary. Supporters will frequently talk about finding new creative solutions to old problems. Opponents will sometimes categorise it as unprincipled bargaining.

²⁰ Subjectivity, or perspectivism, in this context argues for the primacy of the agent's personal response to a matter be that through a particular ethical lens, the reading of a sequence of facts or indeed an appeal to alternative set of facts.

²¹ Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement without giving in* (Penguin, 1981).

²² David Smith, 'A warmer way of disputing: Mediation and conciliation' [1978] 26, *American Journal of Comparative Law* 205.

Pragmatic mediation can be seen to have two sub-models: the facilitative and the evaluative. It will be argued that theoretically whilst both share in a pragmatic concern with settlement only the facilitative model is actually mediation properly understood.

The facilitative approach to mediation, described as ‘pure’ by Menkel-Meadow,²³ involves no adjudicative direction of any kind or any assumption of substantive expertise by the mediator. Instead, the mediator is a third-party, who utilising their own skills, works with the disputants to solve the issues that present themselves. On this account, the mediator assumes a positive attitude towards the disputants. They are sufficiently intelligent and are themselves best placed to find a solution. The mediator’s role then is to remove barriers to engagement and open channels of communication between the parties thereby allowing the participants to reach their own settlement.²⁴ This can be contrasted with evaluative mediation. Brown states that: ‘The evaluative mediator’s tasks include finding facts by properly weighing evidence, judging credibility and allocating burden of proof, determining and applying relevant law, rules or customs and rendering an opinion.’²⁵

Both these predominant models appear to implicitly depend on an ‘outcome’ being achieved. Evaluative mediation has become particularly popular in certain commercial areas of the law where professional expertise is often central to the dispute, for example construction.²⁶ They can therefore, perhaps, be labelled as ‘pragmatic’ forms of mediation. The outcome is either the final settlement of the dispute or, at the very least, a partial settlement through a narrowing of the issues. Both of these models fail to consider, or at least, appear to ignore other strengths or possible advantages of mediation. There appears little reference to enhanced communication, empowerment and transformation that appear in other models.

However, whether evaluative mediation is actually a form of mediation at all is questionable. That it is an ‘alternative’ method of dispute resolution is clear, but it perhaps bears more similarity to early neutral evaluation or judicial determination. This is because in all these methods the third party is not a mere facilitator or perhaps more significantly not *primarily* a facilitator. Rather they act in a vertical relationship to the parties. The evaluative mediator – like the expert, the retired judge, or the like, sits in a relationship of supremacy to the participants. It is they who have the specific expertise be they a civil engineer, a quantity surveyor, architect or whatever. It is they who make decisions about the facts and, in many cases, the law. That the evaluative mediator cannot compel a settlement, or the retired judge cannot issue a binding court order means that they are not forms of litigation. They do however operate on an adjudicative paradigm. This paradigm is vertical or top-down and not horizontal as in mediation. It is arguable that the degree of evaluation is significant and that a mildly evaluative approach may not remove the fundamental, voluntary, and facilitative nature of the mediation as a whole. Further, some evaluative direction may assist the aim of ‘settlement’ or ‘agreement’ – the holy grail of the pragmatic approach.

3.2 Transformative mediation

Other models, which are here termed ‘idealist’, attempt to move away from this. Transformative mediation is one widely recognised approach that seeks to emphasise the value of the process itself and which distances itself from what it sees as narrow results driven conceptions discussed above. It claims that the outcome of the particular dispute to which the mediation pertains is not an important factor. Further, it challenges the assumption that the

²³ Carrie Menkel-Meadow, ‘Lawyer negotiations: theories and realities – what we learn from mediation’ [1993] 56, 3, *Modern Law Review* 361.

²⁴ Leonard Riskin, ‘Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed’ [1996] 1 *Harvard Negotiation Law Review*, 7, 24.

²⁵ Carole Brown, ‘Facilitative mediation: The Classic Approach retails its appeal’ [2003] 4 *Pepperdine Dispute Resolution Journal* 279, 290.

²⁶ Penny Brooker & Suzanne Wilkinson (eds) *Mediation in the Construction Industry: An International Review*. (Abingdon, Spon Press, 2010).

mediator controls the process. It is associated primarily with the work of Bush and Folger who describe it thus:

“The transformative approach instead defines the objective as improving *the parties themselves* from what they were before. In transformative mediation, success is achieved when the parties as persons are changed for the better, to some degree, by what has occurred in the mediation process.”²⁷

Transformative mediation then looks beyond the particular dispute to the person. Originally, moral growth was deemed to be the aim or outcome of transformative mediation. Bush and Folger duly recognised that by stating this they contradictingly were effectively replacing one end goal of mediation for another. In later work, mediation is described as having the “*potential* [of] *transformative effects*.”²⁸ Recognition and empowerment now became the stated goals for Bush and Folger.²⁹ Conflict is not seen as something that is ultimately positive in a way that Fiss might.³⁰ It is not cathartic. Conflict is not about establishing a ‘right’ to something or a precedent or enacting social change. Rather, conflict ‘de-skills’ individuals, disconnecting themselves from others.

Advocates of transformative mediation have been amongst the most vocal in criticising the increasing *juridification* of mediation.³¹ Apart from Bush and Folger, others such as Della Noce and Antes, have expressed concern about the increasing involvement of both lawyers and the courts in mediation.³² They consider this as undesirable as, they argue, that this results in both an increasing emphasis on settlement and on evaluation and appeals to external norms by the mediator. Indeed, Bush and Folger oppose any attempt at mingling any other model with their own.³³

There are numerous critiques of this model. It has been argued that there is little to actually support the rather broad assumptions they make and conclusions they draw.³⁴ Much depends on transformative mediation providing an underlying theory of human development. This is lacking for Seul, for one, who argues that this is seriously under theorised. Neither is an existing theory of psychological human development used to support the claims of the theory nor is a new one presented.³⁵ Kelly has argued that transformative mediation developed ‘as a result of observations rather than systematic analysis of theoretical concepts leading to applications.’³⁶ The most compelling criticism however attacks not gaps in the theory but rather its heart. Mediation seemingly rests on a plurality of values and the view that the mediator is not ‘better’ or more important or more authoritative than the disputants. However, transformative mediation seems to suggest that the values of the transformative mediator namely empowerment and recognition are ontologically prior to the values of the disputants.

²⁷ Joseph P. Folger and Robert A. Baruch Bush, *The Promise of Mediation*, (2nd Edition, San Francisco, Jossey Bass, 1994, 84).

²⁸ Joseph P. Folger and Robert A. Baruch Bush, ‘Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice,’ [1996] 13, 4 *Mediation Quarterly* 263, 277. Italics present in the original.

²⁹ *Ibid* at 263.

³⁰ Owen Fiss, ‘Against Settlement’ [1984] 93 *Yale Law Journal* 1073.

³¹ Penny Brooker, *Mediation Law: Journey to Juridification and Institutionalism* (London, Routledge, 2012).

³² Robert A. Baruch Bush ‘Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field.’ [2002] 3 *Pepperdine Dispute Resolution Law Journal*, 111.

³³ Joseph P. Folger and Robert A. Baruch Bush n28 above.

³⁴ Lisa P. Gaynier, “Transformative mediation: In search of a theory of practice”, [2005] 22 3 *Conflict Resolution Quarterly*, 397.

³⁵ Jeffrey Seul, “How Transformative Is Transformative Mediation? A Constructive-Developmental Assessment.” [1999] 15 1 *Ohio State Journal on Dispute Resolution*, 135.

³⁶ Terri Kelly, *A Somewhat Critical Analysis of the Transformative Model of Mediation*. [2000] Portland, Oregon: Department of Conflict Resolution, Portland State University.

Bush and Folger naturally attempted to respond to this critique and others.³⁷ They argued that the difference lies in the fundamental values and approach of the mediator to the mediation rather than in asserting a specific set of values. It could be argued that this view could be analogous to King Rex's eight principles for a working legal system.³⁸ Mediation, arguably all mediation, requires certain fundamental attitudes or assumptions. Later it will be sketched in more detail what these are and are not. One of them it is argued is that the parties reach their own solutions. In doing this it is likely that they are empowered to do so and that by definition they have achieved some recognition of their own autonomy.

3.3 Narrative Mediation

Narrative mediation ultimately traces its intellectual roots to post-modernism. Facts are socially constructed, and truth is subjective. There are a wide variety of narratives that could possibly deal with the same set of facts. According to narrative mediation, no account has priority or 'more truth.' There is a strong, possibly, radical subjectivity to narrative mediation. It acknowledges cultural context and personal preferences whilst at the same time radically ignoring external attempts at objectivity or norm creation. These external norms include the actual 'law' whether as written in books or generally understood and accepted.

However, narrative mediation is not simply a theory. It has practitioners, albeit far fewer than other models. In this respect, the pragmatic model dominates. This is unsurprising. Narrative mediation is practiced from a number of centres most notably in Hamilton, New Zealand and University of San Diego, USA. Its origins as a practice can be traced to psychological therapy. Emerging in the 1980s the views of the therapist were not prioritised over those of the patient. In this way narrative mediation utilises a horizontal approach to expertise and norms. There is not one 'objective' account but rather there are a multiplicity of stories. The patient was encouraged to find their own story and to create their own narrative, a narrative that moves beyond hurt and rights. 'It is widely accepted that mediation is a storytelling process...telling one's story in mediation serves simultaneously the ethical mandate, "participation," as well as the pragmatic mandate to move "from story to settlement".'³⁹

The narrative account seeks to consider the subjectivity of facts and encourages a story-telling, or a re-story-telling in the light of engagement, trust building and to "deconstruct the conflict-saturated story".⁴⁰ The story-telling tradition is an important aspect of both the practice and theory of narrative mediation. Practically, it seeks to create alternative accounts of the dispute and the participants. It aims to move away from the polarities of victim and oppressor. In doing so it seeks to 'destabilize those "theories of responsibility" which simultaneously serve to legitimate one's point of view and de-legitimate the point of view of the other party.'⁴¹ In doing so the participants are enabled and empowered to see new interpretations of the dispute.

This 'looking afresh' at the dispute would seem to be a common feature of mediation generally. Mediation generally appeals to the creative, personalised solution without recourse to external authorities. The narrative approach also maintains the mediator as a third-party in a horizontal

³⁷ Joseph Folger & Robert A. Baruch Bush, 'A Response to Gaynier's "Transformative Mediation": In Search of a Theory of Practice', [2005] 23 *Conflict Resolution Quarterly*, 123.

³⁸ See Lon L. Fuller, *The Morality of Law* (revised ed, Yale University Press, New Haven, 1969) 33–38 for his description of the eight principles of legality.

³⁹ Sara Cobb, 'A Narrative Perspective on Mediation: Toward the Materialization of the Storytelling Metaphor', in Joseph P. Folger & Tricia S. Jones (eds) *New Directions in Mediation: Communication Research and Perspectives* (Sage, 1994).

⁴⁰ John Winslade & Gerald Monk, *Narrative Mediation: A new approach to conflict mediation*, (San Francisco: Jossey-Bass, 2000).

⁴¹ Toran Hansen, 'The Narrative Approach to Mediation', (2004) 4 *Pepperdine Dispute Resolution Law Journal*, 297, 298.

relationship with the participants to the dispute. There are subtle differences however between narrative mediation and other models. The former questions more radically the existence of external norms whereas for other models they are considered to be simply less useful to the wider goals of settlement (for pragmatic mediation) and transformation and personal growth (for transformative mediation). Narrative mediation in terms of process and outcome seems to sit between the pragmatic and the transformative schools. It places value on the process of the mediation by aiming for the participant to better understand the conflict but also seeks to reach a resolution where the dispute or conflict is no longer.

3.4 Therapeutic mediation

Another so-called model of the 'idealist' persuasion seeks to argue that the insights of therapeutic jurisprudence can be productively applied to mediation. Therapeutic mediation emphasises the healing element of mediation. It is linked to wider trends of therapeutic jurisprudence and restorative justice. Daicoff is one who has recognised the link between mediation and transformative justice:

All of the disciplines comprising the comprehensive law movement share at least two features in common: (1) a desire to maximize the emotional, psychological, and relational wellbeing of the individuals and communities involved in each legal matter; and (2) a focus on more than just strict legal rights, responsibilities, duties, obligations, and entitlements. These two features unify the vectors and distinguish them from more traditional approaches to law and lawyering.⁴²

There is an assumption that bottom-up processes are inherently therapeutic. This is more often claimed rather than evidenced. Nevertheless, this approach is often linked to "Restorative Justice" in the criminal law. Here the aim is to restore not just the victim and her community to its state prior to the breach by the crime, but also to restore the defendant to the community. However, there is little in this that separates therapeutic mediation from other models. It has no distinct rationale or methodology of its own. Rather it is an attempt to emphasise one benefit of mediation. That therapy or healing can be a beneficial aspect of mediation is not questioned. It is however simply a quality that is aspirational to all models of mediation. It is overt in transformative mediation but present in others. It will be discussed further below.

4. Models of mediation and jurisprudential assumptions

There are then a number of different theoretical models of mediation. The three most prevalent are, as outlined above, the pragmatic or problem-solving (itself constructed of two distinct approaches namely the facilitative and the evaluative), the transformative⁴³ and the narrative.⁴⁴ Both the transformative and narrative accounts of mediation give much more weight to the process of the resolution rather than the outcome. The transformative seeks to alter perceived power imbalances through perspective taking and the deliberate making of choices. At one extreme, transformative mediation claims to be wholly uninterested in the outcome itself aiming rather for transformation of the participants and hence onward to the transformation of disputes themselves. It is doubtful if this is in practice the case.

⁴² Susan Daicoff, 'Law as a Healing Profession: The Comprehensive Law Movement,' [2006] 6 *Pepperdine Dispute Resolution Law Journal*, 1, 11.

⁴³ Joseph P. Folger and Robert A. Baruch Bush n27 above.

⁴⁴ Alison Cotter, Gerald Monk, & John Winslade, "A Narrative Approach to the Practice of Mediation" [1998] 14 *Negotiation Journal* 21. John Winslade & Gerald Monk, *Narrative Mediation: A new approach to conflict mediation*, (San Francisco, Jossey-Bass, 2000).

Alberstein has gone further and has identified how different models of mediation display different tensions and concerns existing at the boundaries of theory and practice.⁴⁵ For example, the pragmatic model has at its root a practical lawyering or practitioner focus whereas in the transformative model a therapeutic concern rises to the surface. Alberstein also places the narrative model within an anthropological framework. Probing more deeply in a later work Alberstein argues that each of these models displays their jurisprudential commitments.⁴⁶ Alberstein places the pragmatic account with what is a reasonably well-known account of the emergence of the legal process school⁴⁷ in the US following the second world war.⁴⁸ For Alberstein the pragmatic model echoes the optimism of the legal process school. Things can be done, achieved, overcome. Pragmatic mediation also aims for consensus building; again echoing American culture of the 1950s that found expression in many US law schools of the period notably Harvard.

Alberstein locates the transformative model of mediation within relational feminism. Alberstein is not alone in this assessment although it does run counter to some other critical feminist accounts.⁴⁹ Lichtenstein finds that transformative mediation and feminism both promote self-determination and deal with the question of power by attempting to find alternative readings. Lichtenstein thus locates both transformative mediation and feminism within a 'colorful pluralistic social movement.' Gilligan is often classified as a 'second wave' feminist focusing on the relational.⁵⁰ This relational approach recognises different voices and different perspectives that need to be recognised in order to overcome structural differences and apparent dichotomies such as individualism versus community.

The narrative model has its roots according to Alberstein in the critical legal studies movement originating in the 1970s and 1980s. This movement offered a radical critique of law and its structures as betraying its ideological origins.⁵¹ Alberstein states: 'This call to reveal the ideology behind formal rules is equivalent to the *narrative* model's exposure of the sense of entitlement underlying conflict stories.'⁵²

The Critical Legal Studies project seems to end in despair however with little remaining but scepticism and resignation. The 'law and society' school offers a more optimistic post-modern account by developing the view that disputes are socially constructed. Individuals should internalise their understanding of law in society and their place within it. By doing this they thereby develop a deeper understanding of legal entitlements moving beyond a fixed and basic understanding of 'rights' as something that happens to you (or the State 'gives' to you or the lawyer defends 'for' you) to a situation where the participants are actively involved in creating 'justice'. This echoes Winslade and Monk, two leading theorists of the narrative mediation model, who argue that mediation works by the parties moving beyond the original account of injustice and naïve entitlement and instead co-authoring a new account of shared participation.

What arguably all three models have is a commitment to justice as something that can be, although not necessarily always, discovered between the parties and a sense that conflict in itself is not a valuable or useful process for the individuals and therefore there is an element

⁴⁵ Michal Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, [2007] 22 *Ohio State Journal on Dispute Resolution*, 321.

⁴⁶ Michal Alberstein n10 above, 12.

⁴⁷ I am unhappy with use of terms like 'school' for what are often loosely grouped individuals working in related fields especially as many monikers are added later by historians of ideas but they are used here for brevity, a degree of clarity and because they are used by Alberstein in her paper.

⁴⁸ Neil Duxbury, *Patterns of American Jurisprudence*, (Oxford, OUP, 1995).

⁴⁹ Marsha Lichtenstein, 'Mediation and feminism: Common values and challenges', [2000] 18 *1 Mediation Quarterly*, 19.

⁵⁰ Carol Gilligan, *In A Different Voice* (Cambridge, Harvard University Press, 1982)

⁵¹ Roberto Mangabira Unger, *The Critical Legal Studies Movement*, (Cambridge, Harvard University Press, 1986)

⁵² Michal Alberstein, n10 above.

of trying to mitigate the damage caused by the conflict. Each model takes a distinct approach to this – by creating a positive outcome, by empowerment or by creating a new perspective on the conflict itself – but they share a therapeutic paradigm. Litigation is often seen, arguably correctly, as stressful and difficult. Mediation attempts to provide a less painful way of resolving the dispute. Therapy or healing is pervasive to mediation. It is for this reason that ‘therapeutic mediation’ classified by some as a separate model of mediation is not so here. All models of mediation see value to the person. The pragmatic primarily by ending the dispute in a way that is at least satisfactory to all parties. The transformative by encouraging human growth and change. The narrative by seeing afresh values and norms.

This ‘healing’ aspect was noted by Shaffer and McThenia in their debate with Fiss.⁵³ This clearly demonstrates – once you get beyond the rhetorical and not always helpful language used by both parties – that very different conceptions of what justice is are held by Fiss from Shaffer and McThenia. There may actually be far less difference with the substantive outcomes of justice – a broad fairness seems to appeal to both, but for Fiss this must emerge in a top-down fashion through the courts whereas for Shaffer and McThenia ‘Justice is not usually something that people get from the government. And courts...are not the only or even the most important places that dispense justice.’⁵⁴ It could be argued that those who support mediation and those that oppose it - whatever else might separate or unify them – divide over this point of whether justice is top-down or whether it is bottom-up and therefore pluralistic in some way.

5. The core features of a jurisprudence of mediation

Having outlined the main theoretical models of mediation the remainder of this chapter will seek to consider what each of them appeal to at a more fundamental level. It will consider privacy, informality, voluntariness and autonomy, bottom-up justice, and pluralism.

5.1 Privacy

One of the major criticisms laid at the door of mediation is that it is private. The same is true of course of other forms of ADR including arbitration that originally operated outside the formal court structure but is now subject to both statute⁵⁵ and frequent scrutiny by the courts.⁵⁶ It has already been discussed above that in the UK and most comparable common law jurisdictions mediation now largely takes place within a framework of civil justice and regulation, but this does not seem to satisfy the critics of the practice. What do we mean though by stating that mediation is private? Mediation is private in the limited sense of not taking place in public, but it is now very often part of a wider dispute that is not truly private. It may be court-annexed or on the recommendation of the judge. There are questions on how confidential the mediation actually is.

The question of the public or private nature of dispute resolution cannot then be separated now from its relationship to civil justice as a whole. Mediation as a practice originates outside the domain of civil or family law yet most of the discussion concerning mediation certainly in the UK - but also in Europe and other ‘Western’ jurisdictions⁵⁷ - is now very much centred on

⁵³ Thomas Shaffer and Andrew McThenia, ‘For Reconciliation’ [1985] 94 *The Yale Law Journal*, 1660.

⁵⁴ Ibid 1664-1665.

⁵⁵ Arbitration Act 1996.

⁵⁶ For example, *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 on the question of the confidentiality in arbitration and *Newfield Construction Ltd v Tomlinson* [2005] 97 Con LR 148 on the arbitrator’s award for costs based on procedural irregularity.

⁵⁷ Paula Young, ‘A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the ‘Authorized Practice of Mediation’ Paradigm to ‘Unauthorized Practice of Law’ Disciplinary Bodies,’ 2008 49 *South Texas Law Review*, 1047.

how it relates to and operates within the overarching edifice of the law and the prevailing system of civil justice. Genn sees mediation operating within the sphere of civil litigation. Without the stick of litigation and the threat of costs she argues parties do not usually mediate. The take up of mediation has been disappointingly slow for some members of the judiciary. Brooker has argued that mediation in the civil justice context has now become thoroughly juridified.⁵⁸ This seems unquestionable. There is now an extensive and ever growing case law on when mediation can be legitimately refused⁵⁹ and the sanctions that can be imposed for unreasonably refusing,⁶⁰ the confidentiality of the mediation process, the role of the mediator, the requirement of good faith,⁶¹ the enforceability of any agreed mediation settlement,⁶² and the appropriateness of mediation in various types of disputes⁶³ to name but some of the questions that have been discussed and decided by the English and Welsh judiciary.

How are we to evaluate this process? Some argue that this juridification removes the genuine uniqueness and empowerment from the process.⁶⁴ That a book entitled 'Mediation Law' has been recently published is anathema to this group. They perceive mediation as being wholly separate from litigation not just in terms of its philosophy but also in terms of its organisation. This rather radical position is not the majority position unsurprisingly among lawyers. Indeed, it is lawyers who seem to play an ever-increasing role in mediation whether it is by advocating it, being sceptical about it, acting as gatekeeper or participating whether as the legal representative to a party in mediation or actually as the mediator themselves. The rise of evaluative mediation can be linked to the increasing use of lawyer-mediators or others will specialist subject specific knowledge, for example, in construction law.⁶⁵ Many lawyer mediators seem to be very evaluative. They seem to have no difficulty in stating that this or that is the legal position, 'I help them reach the right answer... the right answer in accord with the legal principles.'⁶⁶ The question of whether these developments are positive or not is a separate question. What is relevant here is what do we mean by privacy in mediation and is this fundamental to our theoretical understanding of it?

Privacy in mediation can have three meanings. This is rarely unpacked. It can mean the actual process is private i.e. takes place in a private room with the discussions remaining private to the parties, the mediators and their legal representatives. This is quite a small claim in reality. Many negotiations are private in this sense. Other forms of ADR are also private in this way. The presence of a mediator who is a third party neutral and bound in most cases by both ethical and practice rules limits the genuine privacy of the process. Frequently, lawyers attend mediations along with their clients. They too are bound by professional ethics and guidance. It seems then that this use of privacy is simply confidentiality. Highly desirable in many cases but not fundamental or unique to mediation.

The next use can apply to the subject matter – law or disputes that only affect the parties concerned. Private law is a distinct category in many jurisdictions. In England and Wales, private law is not a usual category although it is understandable enough. Typically, one would

⁵⁸ Penny Brooker n31 above.

⁵⁹ Julian Sidoli del Ceno, 'Mediation and the Judiciary: Negotiation is not enough', [2012] 21 *Nottingham Law Journal*, 146.

⁶⁰ Julian Sidoli del Ceno, 'Costs, Mediation and the Judiciary' [2015] 92 *The International Journal of Arbitration, Mediation and Dispute Management*, 105.

⁶¹ Penny Brooker, 'Mediating in Good Faith in the English and Welsh Jurisdiction: Lessons from other Common Law Countries' [2014] 43 *Common Law World Review*, 120.

⁶² *David Frost v Wake Smith and Tofields Solicitors* [2013] EWCA Civ 772, 2013 WL 2975981 see: Julian Sidoli del Ceno 'Mediated settlements and Enforceable settlements: Frost v Wake Smith Arbitration, (2013) 79 4 *The International Journal of Arbitration, Mediation and Dispute Management*, 467.

⁶³ *Faidi v Elliott Corp* [2012] EWCA Civ 287 see Julian Sidoli del Ceno 'Mediation in Neighbour Property Disputes Arbitration', (2012) 80 4 *The International Journal of Arbitration, Mediation and Dispute Management*, 405.

⁶⁴ Geoffrey Gibson, 'Is mediation getting on the nose? Are the judges killing mediation?', [2005] 7 6 *ADR Bulletin*: Available at: <http://epublications.bond.edu.au/adr/vol7/iss6/4>

⁶⁵ Penny Brooker & Suzanne Wilkinson n26 above.

⁶⁶ Interview. On file with the author.

think of it as including contract, wills, property, and aspects of family law although other areas might or might not make the list. Where there is clear public approval or disapproval for a certain course of action then the law is 'public' in the sense of criminal sanction or public law *in strictu sensu*. Supporters of mediation usually see it operating either exclusively or very largely in the private arena – the family being the most common. The rationale being that arrangements, say, for the care of children are in most cases a private concern for the parents. A background assumption is that most parents love their children, are broadly rational and will seek to provide the best care as they see fit. There is clearly a subjective or personal element in this, but we don't usually intervene or feel we should intervene unless there is actual neglect or abuse. I may find the thought of parents feeding their children McDonald's distasteful and verging on the obscene, but it remains a private matter. There is a wider sense however that all law is in some sense public. Contracts are subject to statutory intervention, case law and supervision by the courts. Fiss is one theorist who takes the line that there is no private when it comes to law, all is public.

Finally, the other use of private is perhaps the most fundamental. It argues that both the process and the outcome of the mediation are private in the sense that they are subjective to the participants. Here, we find the appeal sometimes implicit sometimes explicit that parties can, do and should find their own solutions and that if the solution is satisfying for them then it is not for external, public scrutiny of its validity according to the law or otherwise. (This assumes parties being broadly equal and non-coerced). Privacy here then equates to a pluralistic conception and a bottom-up understanding of a just outcome. Again, this is contentious, but I contend is fundamental to the nature of mediation without which it cannot be truly mediation.

5.2 Formal and Informal

Mediation theory sits broadly on the informal axis. It is not usually a hidden negotiation or bargain between the parties, the fact that the mediator is a neutral third-party with, for the most part, appropriate skills and training avoids bullying or naked bargaining. Further, in many jurisdictions as outlined above mediation is in a relationship of varying kinds to the prevailing civil or family justice system. The turn to informalism in Western jurisdictions has no agreed roots or indeed causes. Some see it as a welcome relief from ever centralising governmental bodies, be they national or supranational such as the European Union. Others such as Abel argue that the growth of informal dispute resolution bodies has actually increased state activity. If one accepts Abel's arguments, based on the US, then an example in the UK could be considered to be early invention instruments in UK housing. For example, selective licensing of landlords in the private rented sector alongside tenancy deposit legislation has actually increased statutory intervention into areas of residential housing that had previously used adjudication through the courts as the primary or often sole form of dispute resolution in residential housing matters. In this way, areas that were private at least until a dispute requiring adjudication crystallised, have now become subject to scrutiny and intervention.

Roberts and Palmer find a number of 'impulses' towards informalism. They discuss a 'political impulse' that they identify in various co-operative type movements and the like arguing that a socialist inclination lent itself to scepticism about the legal system with its perceived class and wealth biases. They also identify an 'ethnic impulse.'⁶⁷ Here ethnic and religious groups retreat into self-regulating enclaves and self-regulate their own communities often outside of

⁶⁷ Simon Roberts and Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-Making*, (2nd edition, Cambridge, CUP, 2012, 25-27)

the main stream legal culture.⁶⁸ This has been noted recently in contemporary Birmingham.⁶⁹ This notion appears to link to the more common idea of culture. Not only legal anthropologists have found tendencies to informal justice in certain cultures. One of the most widely known culturally supported ideas of informal dispute resolution is found in China. There, going to court is traditionally seen as shameful and a failure irrespective of the strength of the legal claim.⁷⁰ Further, Roberts and Palmer argue for an 'occupational impulse' driven by the demands and culture of work and organisations. Certain trades or professions feel that they are best placed to regulate themselves including any disputes that may emerge. This may be because of a wish for self-governance and independence or because of the sense that only people with particular knowledge, skills or experiences can rightly decide in such matters. They use the example of the mediaeval guild in both Europe and Imperial China.⁷¹ A further 'impulse' is located in the identity of the local community.⁷²

5.3 Voluntariness and autonomy

The voluntary nature of mediation is well-known and well-established. For example, Spencer and Brogan describe a five-fold philosophy of mediation⁷³ with voluntariness finding a place alongside confidentiality, empowerment, neutrality, and a 'unique solution.' Voluntariness can be described as the parties both entering the mediation voluntarily and reaching an agreement (or not) without any coercion. It can also be seen to be solely that any agreement is voluntary. Thus, there is a distinction conceptually between a compulsion to enter the mediation process and a compulsion to settle whilst in the mediation, 'and since compulsion to mediate is pressure of the former kind, there should be no objection.'⁷⁴ Voluntariness is the least controversial of the fundamental assumptions outlined here. It has not been seriously questioned as a hallmark of mediation by any author. There are questions however concerning how one can assess the genuine voluntariness with which a party enters a mediation and what safeguards can be in place. There are obvious guidelines in place that seek to prevent those with mental health issues from engaging in mediation. Further, mediators are typically trained to protect serious power imbalances between the parties. With legal representation increasingly common on both sides of a mediated dispute this aspect is lessening in significance. More widely though there remains what has been termed 'informed consent'.⁷⁵ This means that the individual party must truly understand what is required of them, what can be expected from the mediation, the mediator and the other party. As with any written advice from a lawyer to a client there is no guarantee that the party to a mediation will really understand what has been told them. Further, many clients may not approach a mediation in good faith. Thus, true voluntariness requires not just a lack of coercion but also an adequate understanding of the process and a willingness to engage in the process in good faith. There are subjective elements to assessing each of these in a given party. That they cannot always be accurately assessed or prepared for does not remove their fundamental status in mediation theory.

⁶⁸ Doo Leigh-Wai 'Dispute Settlement in Chinese-American Communities', [1973] 21 *American Journal of Comparative Law*, 627.

⁶⁹ Julian Sidoli del Ceno, 'Informal Law in an Urban Setting' in Nestor Davidson & Nisha Mistry (eds) *Law between buildings: Emergent global perspectives on urban law* (Ashgate, 2016).

⁷⁰ Bee Chen Goh, *Law Without Lawyers, Justice Without Courts: On Traditional Chinese Mediation* (Ashgate 2002). Siew Fang Law, 'Culturally Sensitive Mediation: The Importance of Culture in Mediation Accreditation' [2009] 20 *Australasian Journal of Dispute Resolution*, 162.

⁷¹ Roberts and Palmer n67 above at 27-29.

⁷² *ibid* at 31-38.

⁷³ David Spencer and Michael Brogan *Mediation Law and Practice*, (Cambridge, CUP, 2006) at 84-100 based on Ruth Charlton, *Dispute Resolution Guidebook*, (Pymont: LBC Information Services, 2000).

⁷⁴ Laurence Boulle & Miryana Nescic, *Mediation: Principles Process Practice* (Bloomsbury Pub. 2001) at 372.

⁷⁵ Jacqueline M. Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making,' [1999] 74 *Notre Dame Law Review*, 775.

Implicit in this view though is that the parties have sufficient autonomy. Autonomy from their lawyers, families, and friends to make the decision that they want. Autonomy too from the state and the civil justice system in that they have the autonomy to decide what is a suitable agreement for them. This requires that the individual has some space to operate in. Space that the state must allow them. This space is the private. There are areas of life that are regulated by the state – for example, boundaries. Boundaries can be usually accurately determined by a combination of the land registry, title deeds, chartered surveyors, and visual aids. It is possible then to settle a boundary dispute by using the civil justice system and reaching an answer that is determined by an approximation of law and fact. However, most boundary disputes are between two individuals over privately owned land. Usually there are no wider issues of public interest. Therefore, if the two parties settle this matter between themselves through mediation or otherwise then this is private. The parties have acted autonomously without a formal reference to the state. That the agreement reached is not what the courts might have ordered is of no concern if the parties have reached the agreement themselves.⁷⁶ This is of course an everyday situation. There is no compulsion on a party to issue a claim for breach of contract, trespass, occupier's liability, and a whole host of other civil wrongs.

5.4 Mediation as an Alternative Account of Justice

Spencer and Brogan's 'five-fold philosophy of mediation'⁷⁷ mentioned above aims to develop some of the core values of mediation by distinguishing it, by its very nature, from adjudication. Whilst this 'five-fold' model mentioned has some value in examining some of the 'values' that underpin the typical practice of mediation they do not properly address, nor seek to address, the more basic assumptions upon which mediation rest nor the deeper psychological, ethical and jurisprudential aspects. The same is true of very many other models that invariably focus on the practice of mediation. The purpose of this work as has already been alluded to is to go beyond this superficial account and try to ascertain what is foundational for a jurisprudence of mediation. One aspect of this is that mediation appeals to a different account of justice – the bottom-up rather than the top-down.

Traditional accounts of adjudication and other forms of social order have historically been wedded to a top-down or vertical conception with power emerging from a divinity or those that claim access to the will of the divinity, a mythical foundational law-giver or a sovereign. Even these top-down 'laws' are in most cases enforced by command. Some like Aquinian natural law make claims for universality whereas Austinian positivism is clearly man-made but both are fundamentally top-down. Whether through traditional natural law accounts or positivism most models display a 'legacy of command'.⁷⁸ Roberts and Palmer find this not only in familiar targets such as Hobbes and Austin but argue correctly that Locke, for example, still appeals to central authority and Weber talks of the *leiter* (the leader) and the *verband* (the following).

These parochial understandings of the 'modern' West...potentially distort any broader panorama. First, the central conception of 'order' as intimately linked to 'government' – in the sense of a self-consciously exercised steering role working within a separate, dominant 'public' sphere – fixes too strong an imprint on the way we see the social world.⁷⁹

The top-down approach to law and justice is now no longer universally, indeed widely accepted. Adjudication however remains a resolutely top-down process. Indeed, it would seem it must be so. The judge, the arbitrator and the adjudicator all operate as adjudicators,

⁷⁶ Assuming all other necessary conditions are met.

⁷⁷ Spencer and Brogan n72 above.

⁷⁸ Roberts and Palmer n67 above

⁷⁹ *ibid* at 83.

third parties that make decisions based on fact and law. Mediation does not operate in this way. The third party does not enforce a decision nor is the law or the facts of the dispute fundamental.⁸⁰ The parties are free to agree or disagree with each other and cannot be compelled to settle. This is then a key, perhaps the key distinction between adjudication and mediation. The former is top-down, the latter is bottom-up and yet it is with adjudication that mediation is in a particular relationship. Mediation is almost always compared to and develops in respect of its relationship to adjudication. Whilst there are some who worry about this, the majority do not. What is lost, perhaps, in 'purity' is gained by safeguards and esteem.

Alberstein argues, correctly it would seem that most models of mediation in some sense reject, or at least have some concerns about, what is usually termed 'legal formalism', that there is a coherent, systematic, external system of law that can provide 'fair' adjudicated answers to any 'legal' dispute. Legal formalism emerging as a distinct account displays an optimistic, some would argue naïve understanding of the law. What all versions share however is that law is 'out there' and does not emerge in a subjective or relative or personalised way through the course of the dispute. This traditional view of justice as adjudicated by the courts essentially being top-down and externally enforced has been questioned through legal anthropology. In essence, a wide variety of case studies of different ethnic, cultural and linguistic groups has demonstrated that Western (and other) norms and assumptions are not universal. We are no longer prepared to dismiss otherness as inferiority or backwardness. Further, it has opened-up systems of order that are in some cases naturally more conciliatory, more bottom-up and community driven. Examples abound. An early study still clearly bearing the imprint of Western assumptions of superiority, *Crime and Custom in Savage Society*,⁸¹ identified a lack of central authority institutionalised or otherwise. Famously, the Yanomani combine very little hierarchy or central control with what might be termed by Westerners a strong communitarian and egalitarian spirit. Similar aspects have been found in numerous other studies.

Clastres⁸² goes further and weaves a number of different anthropological and ethnographic studies into an account of a genuine, distinct, horizontal form of societal arrangement. Some within the wider ADR movement have lauded these studies and have suggested that there is no need *per se* for society to be wedded in all cases to institutionalised law and order issuing from a central authority. The anthropological account though is not without critics from within. An interesting case is Laura Nader who went from a position that saw at the very least value and lessons (for the USA in her case) with alternative dispute resolution to one that viewed the ADR movement as 'a pacification scheme, an attempt on the part of powerful interests in law and in economics to stem litigation by the masses, disguised by the rhetoric of an imaginary litigation explosion.'⁸³

The criticisms of Fiss, Genn and others all identify however loosely a concern with the bottom-up element of mediation. The traditional view of adjudication as a top-down enterprise underpins the judicial scepticism about mediation in some quarters - and compulsory mediation in others (although there are others who are both strongly in favour and who see no *prima facie* objection to compulsory mediation).⁸⁴ Critics of ADR such as Auerbach and Abel however accept that traditional litigation does not necessarily result in 'justice' as traditionally conceived. There remains a whole range of obstacles to civil justice. These range from an inequality of bargaining power to the ability of a truthful witness to appear credible in the witness box. There are others. In some jurisdictions there is the 'plea bargain' that at one

⁸⁰ Evaluative mediation makes more use of both law and facts but for this reason is not properly classified as mediation.

⁸¹ Bronislaw Malinski, *Crime and Custom in Savage Society*, (Kegan Paul, Trench and Trubner, 1926).

⁸² Pierre Clastres, *Society against the State: essays in political anthropology*, (trans R Hurley) (Oxford, Blackwell, 1977).

⁸³ Laura Nader, *The Life of the Law; Anthropological Projects* (Berkeley, University of California Press, 2002).

⁸⁴ Clarke MR, (2008) 'The Future of Civil Mediation' Speech to 2nd Annual Mediation Council Conference. http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr_mediation_conference_may08.pdf

level is a rational decision on the part of the individual based on pragmatic concerns quite separate from any reference to justice. Therefore, it is a false opposition to portray litigation as resulting in justice and mediation as merely a compromise agreement that may or may not bear any relation to justice.

It is, then, argued that it is important to properly grasp the concept of justice (if indeed 'justice' is the correct term, loaded as it is with so much meaning) that is applicable not just to the aims of mediation but to its process too. For example, Rock describes an alternative view of justice favoured by many involved, 'In mediation, justice can be understood as the justice that the parties themselves experience, articulate, and embody in their resolution of dispute'.⁸⁵ This wider and, arguably, 'softer' view of justice pervades much thinking on alternative dispute resolution. Hyman and Love describe the bottom-up approach to justice as drawing on:

[t]he rules, standards, principles and beliefs that guide the resolution of the dispute . . . are those held by the parties. The guiding norms . . . may be legal, moral, religious or practical. Parties are free to use whatever standards they wish, not limited to standards that have been adopted by the legislature or articulated by the courts.⁸⁶

Critics of Hyman and Love characterise this view as 'whatever' is agreed upon is justice.⁸⁷ This is not a fair account. Rather, a correct account would go – assuming sufficient intelligence, autonomy and reasonable advice in a dispute concerning genuinely private law then the outcome that the parties arrive at is 'just' for them. Many of these qualifications need to be separately understood and what is 'genuinely private' again needs discussion. It is a subjective position but not radically so. Nor is it one without safeguards. Mediators are trained to spot clients who fail to understand the process or who lack autonomy. As discussed earlier, mediation is now frequently indeed usually part of a wider civil (or family) justice. Lawyers are now very much part of the process. This view of justice as being 'from below' then represents a view that law and dispute resolution can be educative and progressive, that it can encourage and empower individuals to resolve their own problems which ultimately results in a more mature society less determined to argue and litigate. It argues that there can be different solutions and indeed different right answers for different people even when faced with similar conflicts. It does not claim that all disputes can or should be mediated. It does not claim that mediation will resolve all disputes even where it is an appropriate method. It does not seek to displace adjudication within the law but rather act in a complementary way with it.

5.5 Mediation as Plurality

The final foundational principle of mediation theory is plurality. We are not referring here to legal pluralism. Legal pluralism has many definitions. There seem to be at least two main accounts, the descriptive and the normative. The descriptive can be seen in Engle Merry's definition as where 'two or more legal systems coexist in the same social field'.⁸⁸ This view is shared by others⁸⁹ and criticised for its vagueness and lack of usefulness by Tamanaha: '[t]he

⁸⁵ Evan Rock, 'Mindfulness Mediation, The Cultivation of Awareness, Mediator Neutrality and the Possibility of Justice' [2006] 6 *Cardozo Journal of Conflict Resolution*, 347.

⁸⁶ Jonathan Hyman & Lela Love, 'If Portia Were a Mediator: An Inquiry into Justice in Mediation', [2002] 9 *Clinical Law Review*, 157, 160.

⁸⁷ See Joseph Stulberg, 'Mediation and Justice: What standards govern?' [2005] 2 *Cardozo Journal of Conflict Resolution*, 213.

⁸⁸ Sally Engle Merry, 'Legal Pluralism' [1988] *Law and Society Review*, 869, 870.

⁸⁹ For example, Jeremy Waldron, 'Legal Pluralism and the Contrast between Hart's Jurisprudence and Fuller's' in Peter Crane (ed) *The Hart-Fuller Debate in the Twenty-First Century*, (Oxford, Hart, 2010).

legal pluralist attachment of the word 'law' to lived systems of normative order adds no more information, and generates resistance and confusion.⁹⁰

This view then is contrasted with legal monism, that law properly understood consists of one system however imperfect. Normative legal pluralism argues that there is and ought to be a number of different legal orders. However, what is being argued for here is not legal pluralism but rather a pluralism in social ordering. It is in effect appealing to the Fullerian project that was outlined above. It is a small claim but one that is intended both descriptively and normatively. It is a claim that there are numerous ways that individuals in any given society order themselves including resolving disputes. It is also a claim that this is good. This Fullerian pluralism avoids the difficulties and debates of 'legal pluralism.' It also allows mediation to exist in relationship to the formal civil justice system without precluding that in some cases it may operate wholly independently of the courts. Community mediation is an example of this. Frequently, a legal dispute has not crystallised and in many cases it may do so. For example, people parking lawfully in streets during the school run is not a matter that can be litigated. It can however cause anger and frustration. That a community mediation scheme can operate in such a situation is surely beneficial. It provides an arena for the dispute to be resolved, allows views to be aired and potentially stops the matter escalating.

If one accepts bottom-up justice, then one accepts a form of plurality. The claim here is not then a radical version of plurality. It does not need to make a claim that there is no higher standard or no law. It is not an ontological claim. Rather, it is the plurality of description. It emerges from anthropology recognising that just as different tribes, peoples and cultures have different ways of settling disputes. It emerges from observing civil litigation in practice in England and Wales, the different personalities of the clients and their lawyers, their differing needs, the mood and approach of the judge. It can be seen in the vast number of disputes that are settled or simply forgotten about that could have been litigated.

6. Conclusion: Mediation, Pluralism and Justice

This chapter has provided a critical presentation of the current literature on the jurisprudence of mediation. It has argued that there are a number of different approaches and that these reveal much about the first order assumptions of those who hold them. Rather than there being one correct approach to grounding mediation, there are many. This is not a negative but rather should be seen as a positive emerging as it does out of the flexibility and creativity inherent in the process.

With all of them perhaps the core assumption is that justice is not always top-down or applied by an external authority. Depending on what theory one holds as predominant – and as outlined these are not always mutually exclusive – then justice appears in different guises. For the pragmatist, justice could be economic – the cheapest resolution, there are no 'bigger' ideas present. For the transformative theorist, it is the justice of self-discovery and change, for the narrative conception it is genuinely a discovery of self-made justice.

Mediation then depends on a bottom-up conception. Bottom-up or horizontal justice necessarily involves accepting a wide variety of participants bringing many different norms, practices, aspirations, and the like with them. This results in a plurality, a plurality within mediation but also places mediation within a plurality of social ordering. Voluntariness and autonomy, bottom-up justice, and plurality – are then central to a true understanding of mediation.

⁹⁰ Brian Tamanaha, 'The Folly of the 'Social Scientific' Concept of Legal Pluralism' [1993] 20 *Journal of Law and Society*, 192, 212.

The United Kingdom is almost certainly a more plural place now than in 1969. There have been vast social, political, and cultural changes and there is, in most areas of debate, a wider range of opinion in terms of ethics, politics, aesthetics and the like. There has also been a widely noted breakdown in respect for traditional forms of authority. Mediation then with its appeal to the personal and the plural, with its recognition of diversity, with its keenness to empower and with its implied, gentle scepticism of external 'top-down' authority seems very much to capture the zeitgeist of the age. Mediation has emerged almost out of the ether during the last 50 years. It seems likely to play an ever-bigger role in the next 50.

Chapter 11

Gender identity and prisons in England and Wales: The development of rights and rules; checks and balances.

Keren Lloyd Bright

Abstract

Prisons in England and Wales, in common with prisons across the world, segregate prisoners according to the gender binary: male and female. Until relatively recently, those who identify with or express other gender identities were largely ignored. This chapter traces the international developments in the care and management of prisoners with non-binary gender identities. It also critically considers developments in England and Wales, including policy, statute and prison service instructions. The policy context has been particularly fast moving in recent years - often in response to events - and the Prison Service has attempted to strike the appropriate balance between addressing the care and management needs of those prisoners with non-binary gender identities and the safety and wellbeing of all prisoners. Certainly, much progress has been made in prisons in England and Wales over the last two decades and certainly challenges remain. The resourcing of the Prison Service, and the inconsistencies between the rights and rules and the lived experience of prisoners who disclose non-binary gender identities, remain significant issues.

1. Introduction

There are many points of difference between human beings, but prisons in England and Wales in common with other jurisdictions have divided prisoners on the assumption of the gender binary: female and male. Until relatively recently, little account has been taken of those who identify with or express other gender identities. While there is much academic literature about men and women in prison in England and Wales, there is very little about the gender identity and the sexual orientation of prisoners: 'The academic literature about LGBT prisoners is very limited and is dominated by, mainly, North American scholarship focusing on transgender prisoners.' (Dunn, p. 3)

The Yogyakarta Principles define gender identity as:

'... each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms' (The Yogyakarta Principles (2007), p.6).

The diversity of gender identities include those people who wish to transition to another gender (female to male or male to female) and seek legal recognition of this; those who wish to live consistently in the gender with which they identify but not seek legal recognition; those who are non-binary (and therefore do not identify with a single gender); those who are gender fluid (their gender identity varies over time); those who are transvestite (cross dressers); and those who are intersex (have variations of sex characteristics or under-developed sex

characteristics) who wish to retain the sex assigned to them at birth¹ or alternatively wish to identify as intersex. 'Transgender' or 'Trans' are often used as umbrella terms for people whose gender identity and/or gender expression differs from their legally recognised birth sex. 'Transgender' or 'Trans' may also be used to describe those transitioning to a new gender.²

The number of trans people in prison in England and Wales is certainly small and it is not possible to give anything more than an indication in the hundreds out of a total prison population of around 85,000. (Before 2015, statistics were not collected at all on trans prisoners in the custodial estate.) The number of trans people in the prison system is always in flux due to admission and release. Those prisoners who do not disclose their gender identity clearly cannot be counted.³ Those prisoners with a gender recognition certificate are usually located in the custodial estate of their legally recognised gender and are therefore not counted (BBC, 2018a).⁴

In one survey by the HM Chief Inspector of Prisons for England and Wales, 2% of prisoners in adult male prisons identified themselves as 'transgender' or 'transsexual'.⁵ In another survey, only those prisoners whose cases had been before a Transgender Case Board⁶ were counted, with the result that 1.6 transgender prisoners were reported per 1,000 prisoners. 139 transgender prisoners were counted in total in this survey, 42 in women's prisons (22 identified their gender as female, 17 as male, 3 provided no response), 97 in men's prisons (92 identified their gender as female, 2 as male, 3 provided no response). When the 139 transgender prisoners were asked to self-identify their gender identity, 27 self-identified as gender fluid, 10 as intersex and 4 as non-binary.⁷ Trans women⁸ prisoners are then very much in the majority and have tended to dominate the discourse about gender identity in society and in prisons. As a consequence, there is a 'cycle of invisibility' (Dunn, 2013). Many people in prison with different gender identities, such as non-binary, gender fluid and intersex, as well as trans men, are hardly visible and so prison staff are often unlikely to be aware of their needs. Critically, various research projects have concluded that people with different gender identities experience higher rates of mental health issues, self-harm, and suicide than the wider population.⁹ These are exacerbated by the prison environment.

While the overall number of trans prisoners may be low, this still matters: human rights are of universal application. Article 8 of the European Convention on Human Rights (ECHR) protects the right to respect for private life.¹⁰ This is a broad term and judgments have determined that

¹ These are the definitions provided by 'The Care and Management of Individuals who are Transgender' Transgender Policy Framework. The Ministry of Justice and HM Prison and Probation Service (2019).

² In this chapter, 'transgender' and 'transsexual' will be used where a source uses these terms. Otherwise, 'trans' or 'trans woman' or 'trans man' or 'trans people' will be used.

³ In inspections of HMP Leeds and HMP Wormwood Scrubs by HM Inspectorate of Prisons in 2019, no transgender prisoners were identified at the time of the inspection despite each prison holding over 1000 prisoners. A recommendation in the HMP Wormwood Scrubs report suggested that 'The prison should affirm LGBT identities in practical ways so that all prisoners feel able to speak openly about their sexuality if they so wish.' (HM Inspectorate of Prisons, 2020, para. 2.39). The recommendation should ideally have included reference to gender identity, in addition to sexuality.

⁴ Exceptionally dangerous women prisoners may, however, be located in women's units in men's prisons.

⁵ HM Chief Inspector of Prisons for England and Wales Annual Report 2018-19.

⁶ Transgender Case Boards were introduced by Prison Service Instruction 17/2016 'The care and management of transgender prisoners.' See the chapter section on this.

⁷ MOJ and HMPPS (2019), pp. 5 – 6.

⁸ A trans woman is a person who was legally recognised as male at birth but who self-identifies as a woman.

⁹ Bashford, J; Hasan, S; Marriott, C and Patel, K 'Inside Gender Identity: A report on meeting the health and social care needs of transgender people in the criminal justice system.' (2017) Bradford: Community Innovations Enterprise, cited in Ministry of Justice and HM Prisons & Probation Service 'The Care and Management of Individuals who are Transgender'. (2019)

¹⁰ ECHR ARTICLE 8 Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the

this covers the physical and psychological integrity of a person, including their gender identification, name and sexual orientation.¹¹ Article 8 ECHR relates to the way a person lives and their quality of life and therefore encompasses gender expression and the safeguarding of mental health in the custodial estate. The scope of Article 8 as regards gender identity is recognised in more recent prison service instructions and policy frameworks.¹² Any interference with the Article 8 right must be in accordance with the law, have a legitimate aim and be necessary in a democratic society. Where the interference is with an intimate part of an individual's life there must be particularly serious reasons to justify the interference.¹³ ECHR Article 8 and other human rights provided the foundation for the development and formulation of specific rights concerning gender identity and it is to these that we now turn.

2. International and national developments in gender identity and gender rights

In the 1970s, at the beginning of the fifty-year period considered by this book, the prevailing social attitudes and the law of England and Wales barely recognised the diversity of gender identities. Further, the judicial decision in the matrimonial case of *Corbett v Corbett* in 1970 had a far-reaching effect on the law for decades. The case concerned a marriage between a man and a trans woman who had extensive surgery. It was held that a person's sex was fixed at birth (save where a mistake was made about sex assignment) and could not be changed by any circumstances – whether by medical and surgical interventions or by the natural development of sex organs. The psychological integrity of a person, including their gender identification, was deemed irrelevant.¹⁴

In 1975, the Sex Discrimination Act was passed by the UK Parliament. As the title of the statute suggests, it was solely concerned with gender binary (male and female) sex discrimination and consequently there was no provision for gender identity discrimination.¹⁵ It was decades before trans activist campaigning began to influence social attitudes, judicial decisions, and legislative innovation.

Since the 1990s, there have been a series of developments in the recognition of gender identity rights, including in the prison context. The following sections of this chapter consider international developments, legislation in England and Wales, and prison service instructions as set out in Figure 1, together with the lived experience of trans prisoners 'in the "hyper-gendered" world of prisons' (Newcomen, 2017).

interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

¹¹ For a detailed analysis of the Article 8 right including leading judgments, see *Pretty v The United Kingdom* [2002] 2 FLR 45, judgment of 29 April 2002, p.33, para 61. Available at: [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-60448\"\]}](https://hudoc.echr.coe.int/eng#{\)

¹² See for instance para 4.124 in Ministry of Justice and HM Prisons & Probation Service 'The Care and Management of Individuals who are Transgender' (2019).

¹³ *Smith and Grady v UK* (1999) 29 EHRR 493 at p.530 para 89.

¹⁴ In *Corbett v Corbett*, Mrs Corbett was found never to have been female and could not therefore have entered a marriage with Mr Corbett. So, their marriage was void. The decision in *Corbett v Corbett* was given statutory effect by the Nullity of Marriage Act 1971 and later by the consolidating statute, the Matrimonial Causes Act 1973.

¹⁵ This statute was tested in the landmark case of *P v S and Cornwall County Council* Case C-13/94, [1996] IRLR 347. The case concerned discrimination in an employment context, where the plaintiff, a trans woman, was dismissed for reason of redundancy following disclosure of her proposal to undergo gender reassignment. It was held by the tribunal that the Sex Discrimination Act did not apply in these circumstances – the Act was drafted more narrowly than the provisions of the Equal Treatment Directive. It was however held by the European Court of Justice that dismissal for a reason related to gender reassignment was contrary to Article 5(1) of the Equal Treatment Directive.

Figure 1 Key international and national developments

Year	Development
1993	International Bill of Gender Rights
2004	Gender Recognition Act
2006	Equality Act
2007	The Yogyakarta Principles
2009	The United Nations Office on Drugs and Crime 'Handbook on Prisoners with Special Needs'
2010	Equality Act
2011	Prison Service Instruction 07/2011 'The Care and Management of Transsexual Prisoners'
2016	Prison Service Instruction 17/2016 'The Care and Management of Transgender Prisoners'
2019	Ministry of Justice and HM Prison & Probation Service 'The Care and Management of Individuals who are Transgender'

Up until relatively recently, prisoners were located in a prison on the basis of their sex assigned at birth. The gender in which they had led their lives was considered entirely irrelevant. The thinking and debate about gender identity, in contrast to sex assigned at birth, developed during the 1990s and a significant milestone was the International Bill of Gender Rights.

3. The International Bill of Gender Rights

Various iterations of this document were drafted by trans activists in the United States between 1993 and 1996. The International Bill of Gender Rights (IBGR) sets out ten principles, of which six are relevant to trans people in the context of imprisonment:

- The right to define gender identity

- The right to free expression of gender identity
- The right of access to gendered space and participation in gendered activity
- The right to control and change one's own body
- The right to competent medical and professional care
- The right to freedom from psychiatric diagnosis or treatment

While these gender rights are without legal force, they were intended to validate the decisions and actions taken by individuals; frame trans activist discourse; and influence the development of policy and legislation internationally.

'The IBGR is not a human rights instrument, is not ratified by any States, and its legal status is no higher than a wish-list. Nevertheless, it signified a sea change in conceptualising 'gender identity' as a fundamental human right to be protected by law and for individuals who identify as transgender to be entitled to medical care.' (Brunskell-Evans, 2019)

The echoes of the IBGR loom large in trans activist campaigns, in legislative change and in the development of prison rules. The IBGR principles state that: 'All human beings have the right to define their own gender identity regardless of chromosomal sex, genitalia, assigned birth sex, or initial gender role.' The principles also support gender fluidity: '... individuals have the right to define, and to redefine as their lives unfold, their own gender identities' (IBGR).

Of particular resonance with the debate about trans prisoners in the custodial estate are those principles dealing with the right of access to gendered space and the right to freedom from psychiatric diagnosis or treatment. The principle concerning the right of access to gendered space supports access by trans women prisoners to women's prisons and by trans men¹⁶ prisoners to men's prisons: 'No individual shall be denied access to a space by virtue of a self-defined gender identity which is not in accord with chromosomal sex, genitalia, assigned birth sex, or initial gender role' (IBGR). As we shall see in the next section, the procedure required to attain a gender recognition certificate under the Gender Recognition Act 2004 takes a different stance to the principle of the right to freedom from psychiatric diagnosis or treatment: 'Given the right to define one's own gender identity, individuals should not be subject to psychiatric diagnosis or treatment solely on the basis of their gender identity or role' (IBGR).

4. The Gender Recognition Act 2004

Before 2004, prisoners were sent to prisons according to the sex recorded on their birth certificates (provided at birth) in line with Prison Rule 12(1),¹⁷ which provides that 'Women prisoners shall normally be kept separate from male prisoners'. This changed following the coming into force of the Gender Recognition Act 2004 (GRA 2004).¹⁸ This Act provides a procedure by which a trans person may legally change their gender, and this is set out in Figure 2. A medical diagnosis of gender dysphoria - which is where there is a mismatch

¹⁶ A trans man is a person who was legally recognised as female at birth but who self-identifies as a man.

¹⁷ The Prison Rules 1999, SI 1999/728.

¹⁸ The Gender Recognition Act 2004 was introduced following concerns about those who were then described as 'transsexual' people who could not marry as they did not have legal recognition of their gender reassignment. Preceding the enactment of the Gender Recognition Act 2004, were judgments by the European Court of Human Rights in the cases of *Goodwin v The United Kingdom* and *I v The United Kingdom* [2002] 35 EHRR 18 and the judgment of the House of Lords in *Bellinger v Bellinger* [2003] UKHL 21. The European Court of Human Rights held that the UK was in breach of ECHR rights under Articles 8 (the right to respect for private life) and 12 (the right to marry).

between a person's sex assigned at birth and their deeply felt gender and this mismatch causes that person distress - is required.

Figure 2 Legal procedure for issue of a gender recognition certificate

- *A trans applicant who is aged eighteen and over applies to the Gender Recognition Panel for a gender recognition certificate.*
- *The Panel issues a certificate when it is satisfied by evidence that the applicant has, or has had, gender dysphoria; has lived in the acquired gender for a period of two years before the application; and intends to continue to live in the acquired gender until death.*
- *The applicant should provide diagnostic medical evidence of their gender dysphoria from an expert in the field, who is either a psychologist or a general practitioner with the requisite expertise.*
- *If the applicant has received or is planned to receive hormone treatment or any surgical procedures for the purpose of changing sexual characteristics, these must also be disclosed as part of the application (ss1-3 Gender Recognition Act 2004 and Explanatory Notes to the Act).*
- *The fee for the application is £140 and there are additional costs in providing the supporting documentation.¹⁹*

If all the evidential requirements are met, the eventual outcome is the issue of a gender recognition certificate (GRC). The certificate provides 'transsexuals' with legal recognition of their 'acquired gender'²⁰ and entitles those whose birth was originally registered in the UK to apply for a new birth certificate in their 'acquired gender'.²¹ Approximately 300-350 GRCs are issued each year across the UK.²²

Section 9 of the GRA 2004 requires that a person who has obtained a GRC must be treated in accordance with their acquired gender for all purposes. Accordingly, since 2004, a trans woman with a GRC is legally recognised as a woman and can be sent to a women's prison. The same applies to a trans man with a GRC who can be sent to a men's prison. Trans men without a GRC usually prefer to remain in the female custodial estate in any event. This, however, leaves the vexed question of where in the custodial estate to place trans women without a GRC, as they are particularly vulnerable.

The procedure to obtain a GRC set out in Figure 2 is quasi-judicial in nature and campaigns led by Gendered Intelligence, Stonewall and others condemn the current process as 'highly medicalised, bureaucratic and demeaning'. They instead favour a process of self-identification or self-declaration for gender recognition (Stonewall, 2017). As has been noted above, the right in theory to define one's gender identity was set out in the IBGR in 1993. The Government Equalities Office does acknowledge that: '... many trans people find the current requirements overly intrusive and bureaucratic' (Government Equalities Office, 2018). A public consultation on the reform of the GRA 2004 has been undertaken as the Equalities Office wished to

¹⁹ For information about the fee, applying for help with the fee if on benefits or on a low income and the supporting documents which must be provided, see: <https://www.gov.uk/apply-gender-recognition-certificate/how-to-apply>.

²⁰ The terms 'transsexual' and 'acquired gender' are used in the Gender Recognition Act 2004.

²¹ The Act does not address the circumstances of those who are non-binary, intersex or whose gender has fluidity.

²² Tribunal Statistics Quarterly.

evaluate the effectiveness of the legal gender recognition process for those who experienced it.²³ However, and pertinently for the subject of this chapter, the Equalities Office has also stated that the reform of the GRA ‘... will not change the exceptions under the Equality Act 2010 that allow provision for single and separate sex spaces’ and that ‘we are not necessarily proposing self-declaration of gender.’ (Government Equalities Office, 2018). It should also be noted that the GRA 2004 only allows trans people to move between the two binaries and does not provide any recognition of other gender identities.

5. The Equality Act 2006

The Equality Act 2006 (EA 2006) created the Commission for Equality and Human Rights (CEHR)²⁴ whose remit is to support the development of society by working towards the outcomes set out in the ‘general duty’ (s.3 EA 2006). The outcomes encompass valuing diversity; eliminating prejudice and discrimination; respecting the dignity of every individual; protecting human rights; fostering equality of opportunity in participation in society; and encouraging good relations between different groups in society (s.3 EA 2006 and Explanatory Notes to the Act). Through the lens of these outcomes, the CEHR scrutinises the activities and services of public authorities, which include bodies with functions of a public nature. It is presumed that the oversight of the custodial estate is included, as there is no definitive list of the bodies to which the Act applies. The provisions of the Act do include protection from unlawful discrimination or harassment on the grounds of sex or sexual orientation, but there is no mention of gender identity, gender recognition, and gender reassignment. This is curious given the 1996 decision of the European Court of Justice in *P v S and Cornwall County Council*²⁵ and the enactment of the Gender Recognition Act 2004.

6. The Yogyakarta Principles

The long title of the ‘Yogyakarta Principles’ (YP) is this: ‘Principles on the application of international human rights law in relation to sexual orientation and gender identity’. The Principles were drafted by an eminent group of human rights experts in Yogyakarta, Indonesia; first published in 2007; and reviewed and expanded in 2017 (YP plus 10). The Principles are respected as an authoritative interpretation of international law, but they do not have legal effect. They are however influential and persuasive – and far more so than their precursor, the International Bill of Gender Rights.

‘The Principles ... provide a definitional point for bills, resolutions and other documents. This has provided the fertile ground out of which Equality and Human Rights legislation in the UK and other European and non-European countries incorporate ‘gender identity’ as a component part of legal personhood.’ (Brunskell-Evans, 2019)

Some of the Principles are of direct relevance to trans prisoners and to those prisoners with other gender identities, such as the right to legal recognition and the right to treatment with humanity while in detention. According to the Principles, gender identity should be self-defined. If an individual decides to change their name, legal sex or gender on official identity documents such as a passport or driving licence, there should be no requirements as to age, medical and psychological diagnosis and interventions.²⁶ Principle 9 (YP 2007) is concerned with the right to treatment with humanity and dignity while in detention. This principle makes explicit that: ‘Sexual orientation and gender identity are integral to each person’s dignity’.²⁷ YP

²³ The consultation was closed in October 2018.

²⁴ The Commission for Equality and Human Rights is now known as the Equality and Human Rights Commission.

²⁵ See Footnote 13.

²⁶ Principle 3, YP 2007; Principle 31, YP plus 10 2017.

²⁷ Principle 9 is based upon Article 2 of the Universal Declaration of Human Rights (Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex,

plus 10 defines additional state obligations with respect to placement in prisons for policies to combat violence, discrimination and other harm concerning sexual orientation, gender identity, gender expression and sex characteristics.²⁸ Issues such as body or other searches in prison, items to express gender expression, access to gender affirming treatment and medical care and 'protective' solitary confinement²⁹ are covered.³⁰

To conclude and to reiterate, YP and YP plus 10 are of no legal force. They are not international conventions ratified by signatory states, but the extent of their influence can be traced through subsequent international and national developments.

7. The UNODC Handbook on Prisoners with Special Needs

This Handbook was published by the United Nations Office on Drugs and Crime (UNODC) in 2009 and covers special needs such as disability, mental health, terminal illness, ethnicity, and those prisoners who are older or LGBT. (The Handbook arguably requires revision to include those with other gender identities.)

The Handbook specifically notes that where trans women prisoners are placed in men's prisons, as their birth sex is male, they are disproportionately subjected to victimisation, discrimination, physical, emotional and sexual abuse, including rape.³¹ The Handbook expresses with clarity that states are required to protect all LGBT detainees and prisoners in their charge pursuant to a suite of international human rights instruments.

'Although there are no special rules that apply to LGBT prisoners, all provisions included in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment apply to all detainees and prisoners without discrimination.' (UNODC, 2009, pp. 109 – 110)

Furthermore, these international human rights instruments require positive action to be taken, via the principle of equal treatment, to eliminate any form of discrimination or risk of harm faced by prisoners with vulnerabilities, which includes trans people.³² The argument being that punishment by imprisonment is a harsher experience for prisoners with vulnerabilities.

The Handbook refers to the Yogyakarta Principles and builds upon them at some length. It sets out the obligations of states, which include access to hormonal and surgical gender-reassignment treatment for trans prisoners; training for prison staff; and management guidelines for the care and protection of LGBT prisoners. The Handbook states that it is not possible to set out categorical guidance on the placement of trans prisoners in the male and female custodial estate, since many are at different stages of transition. It suggests instead

language, religion, political or other opinion, national or social origin, property, birth or other status.) and Article 17 of the International Covenant on Civil and Political Rights (1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.)

²⁸ YP plus 10, 2017, p.18.

²⁹ When prisoners presenting with gender identity vulnerabilities are placed for their own safety in 'protective segregation' (which typically means solitary confinement with limited access to prison facilities), this amounts to discrimination and in effect a harsher sentence. There have been cases in Turkey and Israel on these issues.

³⁰ YP plus 10, p.18.

³¹ UNODC 2009, pp.105 - 108.

³² UNODC, 2009, p.110.

that placement in prisons be determined on a case by case basis, taking account of both safety concerns and the wishes of the trans prisoners.³³

As with the Yogyakarta Principles, the obligations placed upon states in the UNODC Handbook are not legally binding, but instead exercise extensive influence.

8. The Equality Act 2010

The Equality Act 2010 (EA 2010) replaced existing anti-discrimination legislation in England and Wales with a single statute.³⁴ It introduced the public sector equality duty, which identified eight protected characteristics (s149 EA 2010). Gender reassignment was included for the first time as one of these protected characteristics, but gender identity which encompasses a wider group of disadvantaged people - non-binary, gender fluid, intersex and transvestite - was not. Sex remains a protected characteristic, which covers 'man' and 'woman'. The statute requires public authorities to eliminate direct and indirect discrimination, harassment and victimisation, and foster good relations between persons who share a relevant protected characteristic and those who do not, when developing policy, dealing with their employees and in delivering services.

There is no direct reference to prisons in EA 2010. Section 150(1) EA 2010 defines a public authority as a person who is specified in Schedule 19.

Schedule 19 provides a detailed and comprehensive list of public authorities which includes the Ministry of Justice, the police, court services, and criminal justice public authorities such as HM Chief Inspector of Prisons and the Parole Board. HM Prison Service is responsible for 109 public sector prisons in England and Wales,³⁵ but is not explicitly included in the Schedule 19 list. There are 14 prisons in England and Wales which are privately managed by Sodexo Justice Services, Serco Custodial Services and G4S Justice Services.³⁶ These appear to be brought within the ambit of the Act by s.149(2) which provides that a person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the public sector equality duty. The apparent difference in application between publicly and privately managed prisons under the Act appears to be an oversight and is clearly anomalous. Alternatively, by analogy with public sector prisons, private sector prisons are deemed to be outside the reach of the public sector equality duty.

Notwithstanding the above, HM Prison Service has clearly assumed that the public sector equality duty applies to it, as a series of prison service instructions (or their equivalent) have been developed in 2011, 2016 and 2019, which have attempted to address trans and other gender identity issues.³⁷ Indeed, as will be seen later in the chapter, the prison service instructions go beyond what is strictly required by EA 2010 (and GRA 2004).³⁸ Furthermore, HM Inspectorate of Prisons, which is one of the public authorities listed in Schedule 19, holds all prisons to account in their compliance with prison service instructions.

Turning now to the protected characteristic of gender reassignment, this is accorded to a person under EA 2010 if there is evidence that they are transitioning from their birth sex to their chosen gender. This evidence encompasses a wide range of circumstances - from planning to completion of a planned change. In the words of the Act, gender assignment takes

³³ UNODC, 2009, p.115

³⁴ The EA 2010 replaced the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995.

³⁵ <https://www.gov.uk/government/organisations/hm-prison-service/about>

³⁶ <https://www.justice.gov.uk/about/hmps/contracted-out>

³⁷ See for instance paras 4.122 and 4.123 in Ministry of Justice and HM Prisons & Probation Service 'The Care and Management of Individuals who are Transgender'. (2019)

³⁸ Bourne and Derry, p.74

place where a person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex (s.7(1) EA 2010). Under the Act, the protected characteristic is narrowly defined in terms of gender reassignment rather than a broader concept of gender identity. To reiterate, non-binary, gender fluid, intersex and transvestite people are not included within this protected characteristic.

The Code of Practice accompanying the Act makes clear that the reassignment of a person's sex may be proposed but not completed. Those who begin the process of gender reassignment but later end it, still have the protected characteristic of gender reassignment.³⁹ The process may include gender reassignment medical interventions such as hormone treatment and surgery, but such medical interventions are not mandatory for a person to be protected. 'Part of a process' includes a person being compelled by their gender identity to dress and present themselves in that gender – gender expression, in other words.⁴⁰ Where a person has a medical diagnosis of gender dysphoria or gender identity disorder and these have a substantial and long-term adverse effect on their ability to carry out everyday activities, they will also be protected under the disability discrimination provisions of the Act.⁴¹ The duty to make reasonable adjustments for individuals with a disability is set out in s.20 EA 2010.

The Act makes explicit that it perceives gender reassignment to be a personal process rather than a medical process.⁴² Under the Act, it seems then that gender is in effect self-defined, as called for by IBGR and the Yogyakarta Principles. This is a distinctly different approach to that adopted by GRA 2004 where the process to obtain a gender recognition certificate was described above as overly medicalised and bureaucratic. It is clear that a lower bar is set for the protected characteristic of gender reassignment under EA 2010: there is no time limit for living in the acquired gender and no requirement for a medical diagnosis of gender dysphoria.

The EA 2010 also contains provisions about separate services for the sexes, which are clearly pertinent for the subject of this chapter. Separate services for the sexes are permitted under s26 of the Act and do not contravene the statutory provisions as to sex discrimination if 'the limited provision is a proportionate means of achieving a legitimate aim'. Under s27(5) 'The condition is that the service is provided at a place ... for persons requiring special care, supervision or attention'. In the Explanatory Notes to the Act, examples are given of the exceptions allowed for in ss26-27. These exceptions include male and female hospital wards and homeless hostels.⁴³ By analogy, prisons would also appear to be given exceptional status. Another of the examples is applicable to group therapeutic interventions in women's prisons. This example concerns group counselling: 'A group counselling session is provided for female victims of sexual assault. The organisers do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. This would be lawful.'⁴⁴

In the years following the coming into force of the EA 2010, it has been seen that what may be workable in an open society with free movement of people, becomes much more difficult to implement in a prison system designed on the premise of the gender binary. The rest of this chapter is concerned with this issue.

³⁹ EA 2010 Code of Practice, para. 2.20

⁴⁰ EA 2010 Code of Practice, para. 2.24

⁴¹ EA 2010 Code of Practice, para. 2.25

⁴² EA 2010 Code of Practice, para.2.19.

⁴³ EA 2010, Explanatory Notes, Sch.3, Part 7, para 740.

⁴⁴ EA 2010, Explanatory Notes, Sch.3, Part 7, para 740.

9. Prison Service Instruction 07/2011 'The Care and Management of Transsexual Prisoners'

As noted above, while the Equality Act 2010 makes no explicit reference to publicly managed prisons in Schedule 19, it is clearly assumed by prisons and HM Prison Inspectorate (which is listed as a public authority in Schedule 19) that the Act's provisions about the public sector equality duty and the protected characteristic of gender reassignment apply to the custodial estate. Prison Service Instruction (PSI) 07/2011 'The Care and Management of Transsexual Prisoners'⁴⁵, which was introduced after the EA 2010, regulated the ways in which the National Offender Management Service (NOMS)⁴⁶ should address the needs of trans prisoners in England and Wales.

PSI 07/2011 set out the legal responsibilities of NOMS to 'transsexual' prisoners who were without a gender recognition certificate.⁴⁷ It provided that prisoners who defined themselves as trans and who wished to begin or continue the process of gender reassignment while serving their prison sentence, could live in their acquired gender - but in the custodial estate of their sex assigned at birth. This meant that prisoners were permitted to wear clothes appropriate to their acquired gender and access make-up or any other appropriate item to maintain their gender appearance. Prisoners could also choose a gender appropriate name and expect to be addressed by that name, together with the gender appropriate pronoun, by prison staff. PSI 07/2011 also provided guidance about the medical treatment to be made available to trans prisoners. However, this is not to say that all those staff in HM Prison Service were provided with appropriate training, nor that the provisions of PSI 07/2011 were universally applied.

Even more radically, PSI 07/2011 provided that if a trans prisoner asked to be placed in a prison different to their legally recognised birth sex, a case conference should be convened to consider all elements of the request. Following this, the case conference made a recommendation to a senior manager in the prison service, who made the final decision on prison location.

PSI 07/2011 additionally made certain assumptions. It assumed a trans prisoner would decide to opt for medical interventions such as hormone treatment and gender reassignment surgery and assumed they would wish to be issued with a gender recognition certificate (GRC) in due course. However, it came to be understood that not all trans prisoners necessarily desired medical interventions or GRCs '... and therefore policy in this area needs to evolve and take as its starting presumption a wish to respect someone in the gender in which they identify, once in the care of the criminal justice system'.⁴⁸

In 2015, the Women and Equality Select Committee's Inquiry into 'Transgender Equality' recommended that NOMS review the location decision processes for trans offenders.⁴⁹ NOMS subsequently commissioned a review on the care and management of 'transsexual offenders' in the autumn of 2015 and in the course of this, sought evidence from trans people inside and outside prison. Independent oversight of the review was provided by the charities Prison Reform Trust and Gendered Intelligence. At the same time as the review was commissioned, the suicides of the trans women prisoners Vikki Thompson and Joanne Latham were widely reported by the media and these underlined the need for the review to be wide-ranging. The terms of reference of the review emphasised the need to find the right balance between

⁴⁵ 'Transsexual Prisoners' follows the terminology of EA 2010.

⁴⁶ The National Offender Management Service is now called HM Prison and Probation Service.

⁴⁷ At the time of PSI 07/2011, prisoners were usually held in accordance with the legally recognised gender on their birth certificate or gender recognition certificate.

⁴⁸ Review on the Care and Management of Transgender Offenders, 2016, p.4.

⁴⁹ See: <http://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>

meeting the needs of a trans prisoner and safeguarding the wellbeing of all prisoners.⁵⁰ The need to find the right balance continues to dominate both discourse and subsequent developments.

9.1 Vikki Thompson

Compelling stories can drive both private opinion and public policy. The suicides of trans women in prison are clearly compelling stories and make for sensationalist headlines. However, it is important and instructive to examine the complex life histories beneath the overly simplistic headlines and, more particularly, within the context of prison conditions and operating prison service instructions.

In November 2015, Vikki Thompson was found hanged in her cell in HMP Leeds, a men's prison. She was twenty-one. Her birth sex was recorded as male, but she had identified as female since the age of ten. Thompson had a history of physical and sexual abuse, substance abuse, mental illness (bipolar disorder), self-harm, numerous suicide attempts, criminal convictions, and custodial sentences. Her death was widely reported in the media, which tended to present this tragic event in highly reductive terms: a single cause resulting in a catastrophic effect. Thompson, however, presented with extremely complex issues.

In October 2015, Thompson had been convicted of theft and other offences. She had not undergone gender reassignment surgery and did not have a gender recognition certificate. Her legal representatives submitted to the court that she was essentially a woman and requested that she be placed in a women's prison. This request was not acceded to. Thompson was remanded to HMP Leeds before sentence and staff there initiated a detoxification programme and suicide and self-harm prevention procedures (known as ACCT: Assessment, Care in Custody and Teamwork). There are differing accounts from prison staff (and from her mother and partner) as to whether Thompson wanted to remain in HMP Leeds or to be located in a women's prison: she appears to have said different things at different times.⁵¹ While Vikki Thompson was recognised as a vulnerable prisoner, she was not initially placed in the vulnerable prisoners' unit because she had worked as a sex worker and many of the prisoners on the unit were sex offenders. There was a concern that she would be at greater risk on this unit. Thompson was instead placed in Wing E where she experienced bullying, harassment, and verbal abuse, which prison staff did little to curtail. Thompson also behaved inappropriately by cropping her prison jumper to reveal her midriff and padding a bra with socks (Newcomen, 2016a). In the context of a men's Category B prison, this would have been viewed as provocative, even though PSI 07/2011 permitted gender expression. She was later moved to the vulnerable prisoners' unit at her request. While the staff were concerned about Thompson's location within HMP Leeds, they did not utilise the mechanism available in PSI 07/2011 and try to locate her instead in a women's prison which may have been better able to meet her needs. Whether this was owing to Thompson's equivocation, or to a lack of knowledge on her part or on the part of prison staff, or for some other reason, is not known.

The inquest into Thompson's death highlighted a catalogue of failures within the wider health and criminal justice systems beyond HMP Leeds, together with the failures of her own family. The inquest also determined that Thompson had not intended to take her own life at that time in HMP Leeds (Worley, 2017).

The independent investigation into the death of Thompson by the Prisons and Probation Ombudsman set out a series of case conferences and reviews, medical and supervisory interventions concerning her by staff at HMP Leeds, but it also recorded substantial failings in her care. The failings included a lack of mental health support, significant deficiencies in the

⁵⁰ Review on the Care and Management of Transgender Offenders, 2016, p.3.

⁵¹ See, for instance, Newcomen, 2016a, paras. 34, 36, 78 and 108.

operation of ACCT, and an inadequate level of observation given the suicide risk. It was also noted by the Prisons and Probation Ombudsman that HMP Leeds was under-staffed at the time (Newcomen, 2016a). The Prisons and Probation Ombudsman's report concluded that:

'Although Ms Thompson was not legally regarded as a woman, we consider that decisions about the location of transgender prisoners should be taken individually on their merits with the primary aim of the safety of the individual and others, rather than on blanket policies.' (Newcomen, 2016a, Findings and recommendations, pp 2-3).

9.2 Tara Hudson

At the same time as the events leading to the death of Vikki Thompson, a similar situation was playing out in another part of the country with a different and happier outcome. Tara Hudson was sentenced to twelve weeks in prison after pleading guilty to assault and battery (she head-butted a barman). She was twenty-six years old. Hudson was legally recognised as a man but had lived as a woman all her adult life. She had had reconstructive surgery and had worked as a glamour model. She served seven days of her sentence in the segregation unit of a men's prison, HMP Bristol, before she was transferred to HMP Eastwood Park, a women's prison. This decision was made on the basis that Hudson was considered sufficiently advanced in the gender assignment process, even though she was without a gender recognition certificate. More than 150,000 people had signed a petition in support of her transfer (BBC, 2015 and 2016). Arguably, Hudson's skills in self-publicity and in mobilising media and public support, rather than effective implementation of PSI 07/2011, greatly assisted in her transfer to the female custodial estate.

9.3 Joanne Latham

The death by suicide of Joanne Latham in Woodhill prison in November 2015 was again widely reported in the media.⁵² She was found hanged in her cell at HMP Woodhill, a men's prison. Latham was thirty-eight years old, legally recognised as a man, but in the months before her death had asked to be considered as trans and changed her name.⁵³ Latham had a long history of self-harm and mental health issues, including anti-social and borderline personality disorder. She was sentenced to life imprisonment in 2001 following a conviction for attempted murder. She was later given additional life sentences for the attempted murders of a prisoner at HMP Frankland in 2007 and a patient at Rampton secure hospital in 2011. In 2014, Latham was transferred to the close supervision centre at HMP Woodhill. This is one of a few small centres across the custodial estate that deal with the most disruptive, violent and dangerous prisoners. While held there, Latham requested make-up brushes. There was an unnecessarily long delay in the clearance procedures to deal with the request by prison security staff. Latham was assessed at high risk of suicide. The close supervision centre did activate the ACCT procedures and did monitor her, although not with the frequency of observations that the high risk of suicide required. Latham barricaded herself in her cell, seriously self-harmed and did not respond to a welfare check. The Prisons and Probation Ombudsman determined that prison staff took too long to go into her cell – by which time she was found hanged. However, it should be noted that in close supervision centres there are rules about the number of prison staff required to be present before a prison cell is entered. The Prison and Probation Ombudsman report also concluded that Latham had received appropriate mental health support at the prison (equivalent to the care she could have expected in the community) and mostly appropriate support for trans issues (Newcomen 2016b, para 9). Even if Latham had had a GRC or the benefit of the 2016 prison service instruction for the care and management

⁵² See, for instance, Allison and Pidd, 2015.

⁵³ This may well be entirely coincidental, but there had been a highly successful glamour model of the same name.

of transgender prisoners, given her history it is not likely that she would ever have been transferred to the female custodial estate.⁵⁴

10. Prison Service Instruction 17/2016 'The care and management of transgender prisoners'

The media presented the reforms contained in PSI 17/2016 as arising from the deaths of Vikki Thompson and Joanne Latham, but the review process was already in motion. The Women and Equality Select Committee's Inquiry into 'Transgender Equality' in 2015 was closely followed by the NOMS review on 'The Care and Management of Transsexual Offenders'. NOMS described the timing of the suicides as coincidental.

While the title of PSI 17/2016 specifically referred to transgender prisoners, its ambit went beyond trans men and women prisoners and included those of non-binary gender identity, fluid gender identity, those identifying as transvestite as well as those who are intersex. PSI 17/2016 introduced a voluntary agreement to be drawn up between the prisoner and the wing manager on behalf of the prison which included such matters as dress code (including make-up and jewellery), showers and bathing, searching agreement, and cell sharing risk assessment.⁵⁵

One of the welcome step forwards in this prison service instruction concerned a change in terminology. 'Transsexual' as used in the GRA 2004, EA 2010 and PSI 07/2011 was replaced by 'transgender'.⁵⁶

'The refreshed policy uses the broader term of 'transgender' as this places an emphasis on gender identity of the 'whole person' rather than sexual functioning. Being transgender is independent of sexual orientation. Transgender people may identify as heterosexual, homosexual, bisexual, asexual or may not identify with conventional sexual orientation labels.' (PSI 17/2016, p.3)

PSI 17/2016 also introduced the preferred term of 'affirmed gender' instead of 'acquired gender' when a GRC was applied for or issued.⁵⁷ This term clearly had a positive endorsement for those who have experienced gender dysphoria.

PSI 17/2016 set out a more systematic approach than PSI 77/2011 to placing trans prisoners in the custodial estate of England and Wales if they were without a GRC but were able to provide evidence of living consistently in the gender with which they identified. At either the stage of preparing the pre-sentence report or within three working days of reception into custody, the view of the offender was sought as to whether they wish to be placed in a men's or women's prison. At this point, many trans offenders decided on the prison of their legally recognised gender as shown on their birth certificate. If they wished to be placed in a prison reflecting their preferred gender, then their case went before a local Transgender Case

⁵⁴ 'Fair Play for Women,' which campaigns for the sex-based rights of women and girls, have asked the question: 'Are transgender prison suicides being used as a weapon to promote a political agenda?'. Available at: <https://fairplayforwomen.com/prison-suicide/> (1 Dec 2017)

⁵⁵ PSI 17/2016, Annex D1.

⁵⁶ However, this is not to say that the change in terminology was universally welcome. For instance, those who consider the critical issue to be the incorrect identification of their sex at birth and who see gender as a social construct, may not have welcomed the change. It should also be noted that many prefer the use of the term 'trans' rather than 'transgender'.

⁵⁷ PSI 17/2016, para.5.3.

Board.⁵⁸ Each offender was assessed on a case by case basis⁵⁹ and all risk factors were considered: risk to other offenders; risk from other offenders; risk to self; risk to staff. The Board also considered other issues, including the strength of evidence of living in the preferred gender.⁶⁰ As regards counter evidence, the Board examined whether there was any evidence that the prisoner's decision to transition was related to their sentence length; or a way of gaining access to future victims; or whether there was evidence that the offender sought to test or undermine the policy. Personality disorder diagnosis and/or narcissistic traits, for instance, may be indicative of an insincere motive to transition.⁶¹

It should be noted that all those women offenders (sex assigned at birth, together with those transgender women with GRCs) who posed an exceptionally high risk to others, would be located in women's units in men's prisons.⁶² This would, no doubt, have been the eventual outcome for Joanne Latham.⁶³ Female to male transgender prisoners, on the other hand, were not refused a transfer to men's prisons.⁶⁴

10.1 Jenny Swift

While PSI 17/2016 set out more systematic procedures for the placement of trans prisoners, this is not to say that a suicide risk will be eliminated even when they are followed, as other causal factors may be involved.

Jenny Swift was remanded to HMP Doncaster, a men's prison, on a charge of attempted murder in November 2016 (as the victim later died, this would no doubt have been replaced by a murder charge). She was forty-nine years old and, on her own account, had been in the armed forces. Swift had been a psychiatric inpatient and was volatile, aggressive, and confrontational during her time at HMP Doncaster. She was legally recognised as male, but had been living as a woman in name, dress, and appearance since 2009. Swift had registered with Leeds Gender Identity Clinic, had purchased hormone replacement therapy through the internet and had not yet had any surgery. She was found hanged in her prison cell at the end of December 2016. The report of the Prisons and Probation Ombudsman completely exonerated prison staff in terms of the operation of ACCT procedures. Furthermore, there had been compliance with PSI 17/2016, which was introduced shortly before Swift arrived at HMP Doncaster. Swift was asked whether she wanted a transfer to the female custodial estate and a local Transgender Case Board was convened to consider her case within 12 days of her arrival. She was later informed that there would be a recommendation of a transfer to a women's prison. Where there had been defects in her management as a trans prisoner, these had been in her clinical care. The Ombudsman's report noted staff shortages in the healthcare team. During the six weeks Swift had been held in HMP Doncaster, she had no appointment

⁵⁸ Difficult or complex cases were usually referred to the Complex Case Board. Examples include transgender offenders who pose a very high risk of harm to others and those with a severe personality disorder or complex mental health problems (PSI 17/2016, Annex C2).

⁵⁹ Assessment on a case by case basis is recommended by the UNODC Handbook on Prisoners with Special Needs.

⁶⁰ PSI 17/2016, Annex C2.

⁶¹ PSI 17/2016, Annex A and Annex C2.

⁶² PSI 17/2016, para 6.3.

⁶³ PSI 17/2016, para 6.3: 'There may be exceptional cases where it is necessary to refuse a transfer to the female estate for a transgender (male to female) prisoner with a GRC. This can only happen if the risk concerns surrounding the prisoner are sufficiently high that other women with an equivalent security profile would also be held in the male estate. If a transfer is refused, the prisoner will be a female prisoner in the male estate. She must be held separately and according to a female prisoner regime as set out in PSO 4800. This provision exists as the male estate has greater capacity to manage prisoners who pose an exceptionally high risk to others.'

⁶⁴ PSI 17/2016, para 6.4: 'A female to male transgender offender with a GRC must not be refused a transfer to the male estate. This is because there are no security grounds that can prevent location in the male estate.'

with a GP and so had been without a prescription for hormone replacement therapy despite her frequent requests (Newcomen, 2017).

10.2 Karen White

While the provisions of PSI 17/2016 were seemingly thorough, the case of Karen White provides a stark example of what can occur when a decision to place a trans woman in the female custodial estate proves to be seriously flawed. The case also raises the issue of how best to ascertain that an apparently trans woman prisoner is genuinely experiencing gender dysphoria, as opposed to a sexual predator assuming the guise of a trans woman.

In 2018, Karen White, a trans woman aged fifty-two, received a life sentence for sexually assaulting two female inmates in prison and raping two other women outside prison. White was legally recognised as a man and lived most of her life as Stephen Wood. Before 2017, White had previous convictions for violence and dishonesty; indecent assault, indecent exposure and gross indecency involving women and children. In 2017, she was charged after threatening to kill and stabbing an elderly neighbour. White was held on remand at HMP New Hall, a women's prison, and began a gender reassignment process, which included wearing a wig, make-up, and false breasts. While there, she sexually assaulted two female prisoners⁶⁵ and wrote to one of her rape victims whom she had met at a psychiatric unit in 2017. The investigating police officers additionally found that White had in 2003 allegedly raped another woman, but the prosecution had not proceeded. White pleaded guilty to rape and sexual assault and was transferred to HMP Leeds, a men's prison (Parveen, 2018; BBC, 2018b).

The extent to which White was genuinely committed to gender reassignment was questioned during her sentencing hearing at Leeds Crown Court. Before the sentence was handed down, the prosecuting barrister submitted that White '... is *allegedly* [emphasis added] a transgender female'. The judge as part of his sentencing remarks said that:

'The prosecution say *allegedly* [emphasis added] because there's smatterings of evidence in this case that the defendant's approach to transitioning has been less than committed ... The prosecution suggest the reason for the lack of commitment towards transitioning is so the defendant can use a transgender persona to put herself in contact with vulnerable persons she can then abuse.' (BBC, 2018b; Parveen, 2018)

The judge as part of his sentencing remarks addressed White in these terms: 'You are a predator and highly manipulative and in my view you are a danger. You represent a significant risk of serious harm to children, to women and to the general public.' After the case was concluded, the Ministry of Justice apologised for placing White in a women's prison and admitted that her offending history had not been fully considered (BBC, 2018b; Parveen, 2018).

If at some future point White secures a GRC, it is not considered likely that she will be transferred from the male custodial estate to the female because of the risk of harm she poses to women (BBC, 2018b). A prison service spokesman commented that: 'While we work to manage all prisoners, including those who are transgender, sensitively and in line with the law, we are clear that the safety of all prisoners must be our absolute priority.' (BBC, 2018b). This is a policy position that is frequently reiterated.

⁶⁵ It should perhaps be noted in the interests of fairness that the offences of sexual assault (touching another person sexually without their consent) admitted by Karen White were towards the less serious end of the scale. She pressed herself against another prisoner while in a queue for medication at HMP New Hall; and while in a prison workshop, White made inappropriate comments to another prisoner and then grabbed their hand and put it on one of her breasts with the words 'Oh look, they are not real ones.' The BBC report used the word 'attacked', which appears to exaggerate the facts (Parveen, 2018; BBC, 2018b).

11. Ministry of Justice and HM Prisons & Probation Service ‘The Care and Management of Individuals who are Transgender’ 2019

The case of Karen White prompted a review which resulted in the above-named document. This is presented as a ‘Transgender Policy Framework’ and not as a Prison Service Instruction (although operationally this will make little difference). It replaces PSI 17/2016 and was implemented at the end of October 2019. Importantly, it provides procedures for managing prisoners with diverse gender identities.

Those prisoners who self-identify as non-binary, gender fluid, transvestite, intersex (who wish to remain in their sex assigned at birth), and trans but do not seek legal recognition of the gender with which they identify, are placed in prisons in accordance with their assigned birth sex and their cases are not routinely referred to Transgender Case Boards. (It should be noted that recent HMPPS equality data indicates that most trans people in prison do not seek legal recognition of the gender with which they identify, nor to be located in a prison which does not match their sex assigned at birth.)⁶⁶

The Policy Framework (in common with the preceding PSI 17/2016) provides that those people self-identifying with different gender identities should be managed on a case by case basis through drawing up individual voluntary agreements.⁶⁷ Clearly voluntary agreements can only be drawn up following disclosure by prisoners of their gender identity and many prefer to remain invisible to better safeguard their wellbeing.

All individuals who are trans must initially be located in a prison which matches their legally recognised gender (or on the best available evidence where their legal gender is not confirmed),⁶⁸ whether that is their sex assigned at birth or their GRC – save where a decision to the contrary has been made by the Complex Case Board.⁶⁹

Transgender Case Boards should be convened within fourteen days of arrival into custody and are provided mainly for those who seek to live consistently in a different gender to their assigned birth sex. Individuals are asked whether they would prefer to be held in a men’s or women’s prison. Where they wish to remain in the custodial estate of their birth sex, the Transgender Case Board discusses their appropriate management as a trans prisoner and produces a care and management plan. Where they wish to be transferred to the custodial estate of the gender with which they identify, the Transgender Case Board refers their case to the centrally managed Complex Transgender Case Board.⁷⁰ This referral is a new procedure which considerably tightens the pre-existing PSI 17/2016 regime. Neither is it automatic that

⁶⁶ MOJ and HMPPS (2019), para 2.4. This is due, amongst other reasons, to cost and the bureaucratic nature of the process, as described in the section ‘The Gender Recognition Act 2004’ above. See also: Government Equalities Office (July 2018) pp. 19 – 20, which discusses the difficulty in accessing gender identity services and long waiting lists.

⁶⁷ The individual voluntary agreements include such matters as searching arrangements, promotion of well-being and expression of gender identity. Gender expression includes hair, make-up, prostheses and clothing, which is subject to relevant dress codes.

⁶⁸ The Transgender Policy Framework provides that a physical examination must not be conducted for the purpose of determining gender.

⁶⁹ This reflects Prison Rule 12(1) ‘Women prisoners shall normally be kept separate from male prisoners.’ (SI 1999 No. 728 Prisons. The Prison Rules 1999.)

⁷⁰ Other referrals to the Complex Transgender Case Board include:

- Where a transgender prisoner may present a risk to others and/or to themselves which requires special management.
- Where a transgender individual is at risk from other people in custody.
- Where a transgender individual with a GRC presents risks which are deemed to be unmanageable within the estate/AP of their legal gender and may need to be held in separate accommodation or in the estate of the opposite gender in accordance with Prison Rule 12.
- Where a person gains legal recognition of their gender during a custodial term or whilst on licence residing at an AP. (MOJ and HMPPS, 2019, p.15)

a trans prisoner with a GRC will be sent to the custodial estate of their legally recognised gender. There is an awareness of the impact this may have on the well-being and mental health of trans prisoners who may have lived in their affirmed gender for a considerable period of time - as SASH assessments (Suicide and Self-Harm) and ACCT procedures are highlighted in the Policy Framework.

The Transgender Policy Framework demonstrates a great deal of learning from the Karen White case. Safeguarding and decision-making processes have been made extremely rigorous and thorough. The Policy Framework places emphasis upon ‘... adopting a balanced approach which considers the safety and needs of those who are transgender, whilst ensuring that decisions do not negatively impact on the well-being and safety of others, particularly in custodial settings such as women’s prisons.’ (MOJ and HMPPS, 2019, p.2)

The template disclosure forms for use by the Case Boards now require far more extensive information, evidence, and non-disclosable intelligence about offending history (particularly concerning evidence of coercive control within a relationship and sexual and violent offences). The risk of harm summary has been extended to include risk to children and the public, as well as to the individual, prison staff, and to and from other prisoners. Where the individual is seeking to be placed in a women’s prison, information about previous actions which have not resulted in convictions, and the risk of sexual or violent assault to women prisoners, is required. This includes evidence about an individual’s anatomy, including considerations of physical strength and genitalia.⁷¹ The disclosure form must be disclosed to the prisoner at least four days before the case comes before the Transgender Case Board – save for the non-disclosable element.⁷²

The period for the convening of a Transgender Case Board has been extended from three (PSI 17/2016) to fourteen days to allow for the extensive information gathering exercise. This has caused concern, particularly amongst trans activist groups who see this as a regressive step for trans prisoners with vulnerabilities and the potential for them to suffer harassment, bullying, sexual assault and violence.⁷³ Some of the evidence required, for instance around anatomy (including physical strength and genitalia), has again caused concern about the infringement of human rights. While ECHR Article 8 (the right to respect for private life) is clearly engaged, following the Karen White case, it would seem that interference with this right is justified in the circumstances if it is in accordance with law ‘... for the prevention of disorder or crime ... or for the protection of the rights and freedoms of others’.⁷⁴

12. Gender identity and the future of the custodial estate

As has been emphasised, the Ministry of Justice and HM Prisons & Probation Service have had to judge and execute a careful balance in their care and management of all prisoners and those expressing different gender identities to the gender binary. However, there remains a gap between the theory of technical guidance and the reality of practice in prisons. HM Chief Inspector of Prisons for England and Wales has recently concluded that: ‘Most individuals [with disclosed different gender identities] received support, but some prisons were not aware of the full extent of needs of these prisoners and had not yet identified and addressed them.’⁷⁵ It is clearly impossible to quantify this gap between theory and practice beyond the spotlight

⁷¹ MOJ and HMPPS, 2019, p.12.

⁷² That part of the form relating to ‘intelligence’ is non-disclosable if it meets the criteria under the Data Protection Act 2018 as to its restricted or sensitive nature.

⁷³ See, for instance, <https://eachother.org.uk/transgender-prisoners-regressive-policy>

⁷⁴ ECHR ARTICLE 8 Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

⁷⁵ HM Chief Inspector of Prisons, 2019.

of reports from the prison inspectorate⁷⁶ and independent investigations of the prisons' ombudsman following the suicide of a prisoner. Undoubtedly the prison service is experiencing a serious shortfall of resources, in common with other parts of the criminal justice system:

‘... as so often happens, the resources are limited and time is increasingly in short supply. Prisons may have policies in place, some training packages for staff delivered, but most are unable to realise the practical support that such policies recommend’. (Forder (a), p.6)

Accounts from serving prisoners unsurprisingly indicate highly variable experiences. Sarah Jane Baker, a trans woman, served a life sentence of over 30 years for the attempted murder of another prisoner, which took place while she was serving a prison sentence for kidnapping and torturing her stepmother's brother. While imprisoned, she wrote a book entitled ‘Transgender Behind Prison Walls’, which largely provides practical advice and guidance for trans women prisoners:

‘... from my experience, prison Governors [sic] have tended to merely pay lip service (or even refused to acknowledge) many PSI recommendations ... At present, unless a Gender Recognition Certificate is produced by a prisoner, or evidence showing that they were being treated for gender dysphoria before coming into prison, a prison Governor [sic] may state, unchallenged, that prisoners who identify themselves as transgender are making a ‘lifestyle choice’. This label is, in itself, to transgender prisoners, demeaning, humiliating and highly offensive, and it allows prison staff to avoid any discrimination claims.’ (Baker, 2017, p.17).

More mixed experiences, including the positive, are recorded in a book entitled ‘Released Inside. Conversations with transgender prisoners and the staff that care for them’ (Forder (a)). Some prisons are clearly more progressive and PSI-compliant than others - so much depends on the ethos of prison management and on the type of prison.⁷⁷ Additionally, in these prisons, more prisoners feel safe in disclosing their gender identity and become visible to the prison regime.

In view of the inconsistencies in approach across the custodial estate, some trans women prisoners interviewed for Forder's book suggest that there should be dedicated units with appropriately trained staff for trans women prisoners in selected prisons. Trans women prisoners are often placed on the sex offenders' wing or in solitary confinement in segregation units for their own or others' safety, neither of which may be appropriate, and which may cause or exacerbate mental health issues.⁷⁸

One academic commentator suggests a vision of a gender-neutral prison system, which is perhaps designed to spark debate more than anything else as most would see this as

⁷⁶ For instance, the report by HM Inspectorate of Prisons following an inspection of HMP Parc, a men's prison, noted that while individual plans were in place for transgender prisoners, they were not always implemented effectively. The report recommended that transgender prisoners should be given greater assistance in accessing suitable clothes and make-up (HM Inspectorate of Prisons, 2020, paras. S22, 2.32, 2.34). By contrast, the report following an inspection of HMP Eastwood Park, a women's prison, noted there were two transgender prisoners at the time of the inspection and that they received good support (HM Inspectorate of Prisons, 2020, para. 2.24).

⁷⁷ There is much more ‘churn’ in local prisons where many prisoners are held on remand before court hearings. The prison population in these prisons is more transient and individual prisoners are less likely to disclose their gender identity.

⁷⁸ See, for instance, ‘HMP Eastwood Park: Concern over segregated transgender women prisoners.’ Available at: <https://www.bbc.co.uk/news/uk-england-bristol-51928421>

unacceptably radical, as well as increasing the risk of harm to some prisoners, particularly women.

‘Despite our legislative nonexistence, a growing number of us identify outside the gender binary ... It is becoming increasingly clear that the sex-segregated nature of our prison system is incongruous with the gendered realities of a significant minority of people. We are witnessing a shift in wider society towards non-gender specific services and facilities. Perhaps the future of our prison system is also gender-neutral.’ (Harris, 2016)

There remains intense debate about the Gender Recognition Act 2004 and what is considered by many to be its over-medicalised and bureaucratic approach to the gaining of a GRC.⁷⁹ The consultation on the reform of the gender identity laws closed in October 2018; a government response remains awaited; and the trans activist and feminist campaigns have set out their stalls. In 2019, a letter drafted by the LGBT Foundation and signed by over a hundred charities and campaigners was sent to Prime Minister Boris Johnson.

‘We have come together to reiterate how critical these reforms are to removing the barriers that trans and non-binary people face every day ... By introducing new legislation to allow changes to trans and non-binary people’s birth certificates without a judgement panel, high fees, doctors letters and evidence, the biggest change is that their dignity and rights are respected.’ (Paul Martin, quoted by Hunte, 2019)

‘Fair Play for Women’ which campaigns for the sex-based rights of women and girls, opposes reform.

‘GRA reform would mean any male could change their birth certificate to say they were born female ... Women have a lawful right to exclude males from female-only spaces when it’s necessary for privacy, safety and fairness ... It would make women’s existing legal rights “unworkable” ... advancing rights for one group at the expense of another vulnerable group’. (Nicola Williams, quoted by Hunte, 2019)

It is possible on a theoretical level to have empathy with both standpoints. However, when the debate is placed in the context of a gender binary prison system, finding solutions that are fair and just to all is exceptionally challenging. A significant number of women in prison have vulnerabilities, including previously suffering physical, sexual and psychological abuse, mostly at the hands of men. Nearly 60% of women in prison who have had an assessment have experienced domestic abuse.⁸⁰ The true figure is likely to be higher, taking account of both those who do not wish to disclose the abuse they have suffered and those who do not comprehend that they have suffered psychological abuse. Rhona Hotchkiss, formerly the governor of Cornton Vale, a women’s prison in Scotland, has said that in her experience:

‘... it is always an issue to have trans women in with female prisoners. I think you have to think beyond the obvious things like physical or sexual threat which are sometimes an issue to the very fact of the presence of a male bodied person in amongst vulnerable women causes them distress and consternation.’ (BBC News, 2020a)

Another issue which can be found in the literature but is not much discussed in the context of placing trans people in prisons, is the socialisation of men and women – that is, the adoption of behavioural norms that are acceptable to society. A hurdle many trans people face is being socialised in the gender with which they were assigned at birth and then transitioning to

⁷⁹ There is also debate in Scotland on the same issue (Macaskill, M. and Hellen, N., 2020)

⁸⁰ MOJ, 2018.

another gender not just physically, but socially as well.⁸¹ The challenges of understanding and conforming to another gender socialisation are amplified in prison.

In the section on the UNODC Handbook on Prisoners with Special Needs, it was noted that the Handbook states that it is not possible to set out definitive guidance on the placement of trans prisoners, since many are at different stages of transition. The Handbook suggests that placement in prisons be determined instead on a case by case basis. Suzy Dymond-White, the governor of HMP Eastwood Park, a women's prison, has expressed a view which is very much in alignment with the Handbook.

'I would prefer to maintain people as individuals and transgender people are at different states of transition and they have different backgrounds and they're in different states not just physically but emotionally and mentally as well ... A basic set of guidelines is always useful but actually we should assess the people as individuals and look at what their needs are.' (Dymond-White, BBC News, 2016)

On this basis, some men and women trans prisoners may be safely integrated into prison populations; others would be best placed in specialised units within prisons for their own or others' safety.

The first prison unit in England and Wales for trans women prisoners opened in March 2019. The wing is within HMP Downview, a women's prison in Surrey. The first inmates have GRCs, are male bodied and originally it was intended that they should not have access to other women prisoners due to safety concerns (Gilligan, 2019; BBC, 2019a). Access is currently limited.⁸² This is an initiative by the MOJ and the prison service following the Karen White case to strike the appropriate balance between the rights of trans prisoners and the safety of other prisoners. There is no suggestion at the time of writing that specialised units for trans prisoners will be established in the male custodial estate or that the initiative at HMP Downview will be replicated in other women's prisons.

13. Conclusion

This chapter has traced the key developments internationally and nationally in the development of gender identity rights and the rules concerning the care and management of prisoners with different gender identities in England and Wales. Certainly, much progress has been made over the last two decades in what had been a barely visible issue and certainly challenges remain. The resourcing of the prison service, and the inconsistencies between the rights and rules and how they are applied to prisoners who disclose different gender identities, remain significant issues.

'Prisons are always difficult environments ... but they have a fundamental responsibility to keep prisoners safe and to protect and support those with particular vulnerabilities. Transgender prisoners are among the most vulnerable, with evident risks of suicide and self-harm, as well as facing bullying and harassment. Undoubtedly, managing transgender prisoners safely and fairly poses challenges for prison staff in the "hyper-gendered" world of prisons, but law and policy are unequivocal that this is what is required.' (Newcomen, 2017)

⁸¹ See, for instance, McBee, T.P. 'Amateur. A reckoning with gender, identity and masculinity' (2018)

⁸² Owing to boredom and serious levels of self-harm, limited access to women prisoners was permitted. Access is via 'purposeful activity', which includes fitness sessions, library and chapel units (Gilligan A., 2019).

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Chapter 12

Lockdown, Law & the Whirligig of Jurisprudence: The Return of a Realist

David Dennis and Simon Lee

Abstract

This chapter seeks to apply the lessons which can be learned from Karl Llewellyn's jurisprudence to the Covid-19 pandemic, which has had a widespread effect on populations not only in the UK and the European Union but worldwide. It considers some of the jurisprudential aspects which arise from the attempts to deal with the medical and public health crisis through the use of legal regulations in the UK context. The questions to which the use of legal regulations give rise are many and wide in nature. They extend in scope to matters beyond what might be regarded as the notion of the strictly 'legal' in its narrower sense. This chapter argues that these jurisprudential aspects can most usefully be analysed through adopting the framework of Llewellyn's 'law-jobs' theory, and as part of that theory, the single institution of what he described as 'law-government'. The statement in *The Bramble Bush* that 'What ... officials do about disputes ... is the law itself' has an important bearing on both. The continuing relevance and importance of the 'law-jobs' theory and the 'law-government' institution, we argue, deserve a resurgence in interest in the far-reaching scope and applicability of Llewellyn's jurisprudence and a greater recognition of its significance than is commonly displayed today.

1. Introduction

The Open University was conceived and born in the 1960s. Jurisprudence, of course, has a far longer lineage. Socrates, for example, was articulating the reasons why there might be a moral obligation to obey an unjust law in 399 BC. Sir Stephen Sedley referred in 2018 to "the whirligig of time"¹ in comparing the time spans needed to achieve various changes in ideologies in the sphere of human rights. Beyond the sphere of human rights, the image of the whirligig (or spinning toy) is even more appropriately invoked in the sphere of jurisprudence² before and after the opening of the Open University.

¹ 'There is a striking and perhaps significant contrast between, on the one hand, the centuries which it took to make the transition from largely self-serving ideas and ideologies which underpinned slavery and race discrimination to the modern unacceptability of both, and on the other hand, the brief span of years from the Stonewall raids and riots of 1969 to the decriminalisation of homosexual acts and the legal recognition of same-sex marriages ... The only thing that that can be treated as certain is that human rights will not stay where they now are. The whirligig of time will see to that. Whether they will advance or retreat, and what will cause them to do so, we cannot say; but one has to hope in the present climate that it is not Caliban, rather than Malvolio who is about to be revenged upon the whole pack of us.' (Sir Stephen Sedley, *Law and The Whirligig of Time of Time* (Oxford, Bloomsbury Publishing, 2018) 50).

² We use the term 'jurisprudence' here in its wider sense and one which is not confined or restricted in meaning or use to 'legal philosophy', including the particular branch of 'analytical legal philosophy' as exemplified in the works of jurists such as HLA Hart and Joseph Raz. Such a restriction would exclude the adoption within a jurisprudential context of other important alternative perspectives, such as the historical, sociological, and contextual socio-legal perspectives, all of which afford valuable jurisprudential insights. See Twining's alternative way of viewing

This whirligig of jurisprudence has seen theories come and go and return in cycles. The 1960s, for example, had seen jurisprudence enjoying a resurgence. The most famous British legal theorist of the twentieth century, HLA Hart, published *The Concept of Law*³ in 1961, which provided one of the most significant spring-boards of jurisprudential debate. One of the leading American legal thinkers of that century, Karl Llewellyn,⁴ died a year later, in 1962, just as his *Jurisprudence: Realism in Theory and Practice*,⁵ a collection of papers previously published between 1928 and 1960 in relation to the broader aspects of Legal Realism, was about to be published. One year before the Open University received its Royal Charter in 1969, the American Ronald Dworkin was appointed to the Chair of Jurisprudence at Oxford in succession to Hart.

Open University students began to graduate in the 1970s but not in Law. Jurisprudence continued to look backwards and forwards to good effect. In 1973, the twentieth century's most famous Continental legal philosopher, Hans Kelsen, died while William Twining published *Karl Llewellyn and the Realist Movement*,⁶ heralding the beginning of a period in which serious consideration began to be devoted to a re-assessment of the significance of Karl Llewellyn within American Legal Realism, not least through the Law in Context movement, in which Twining has played such a significant role. Like Kelsen, Twining's writing on law and jurisprudence has spanned half a century and that of Llewellyn, Hart and Dworkin over 40 years.

In the first fifty years of the Open University, many other theoretical approaches to law have come to the fore, such as Feminist Legal Theory, Critical Legal Studies, and Critical Race Theory, promoting diverse perspectives on the law from previously marginalized standpoints. Over a larger span of time, other legal theories have seemingly risen and fallen. Thus, at the end of the nineteenth century and the beginning of the twentieth century, Natural Law theory appeared to have been eclipsed by Austinian Legal Positivism. Then the rise of totalitarian regimes in Germany, Italy and Russia provided the background for a revival of Natural Law theory after the Second World War, under the auspices of Radbruch, Fuller and later Finnis and, in the form of interpretivism, Dworkin. Some of the Scandinavian Legal Realists were thought to be tainted by association with such regimes. In the US, Legal Realism which seemingly had its heyday in the late 1920's and the 1930s and was closely associated with the empirical, particularist and behavioural approach of scientific naturalism, also seemed to fall away because of the same events. Secular and Thomist Natural Law theorists, proponents of philosophical rationalism and others argued that scientific rationalism generally, and Legal Realism in particular, failed to reflect ethical, moral and democratic values.

There does not have to be a legal theory, a movement or even a law school for a university to contribute to the promotion of social justice in thought and action. The work of Professor Stuart Hall at the Open University, for example, had a huge influence in anticipating by decades the 2020 phenomenon of #BlackLivesMatter. The Open University more generally made a vital contribution in Northern Ireland in the education of those interned or imprisoned in the Troubles in the 1970s, principally through its pioneering courses on Sociology. Its very

jurisprudence as the theoretical aspect of law-as-a discipline (i.e. academic law) and the important functions it can potentially perform: W. Twining, 'Academic Philosophy and Legal Philosophy: The Significance of Herbert Hart' (1979) 95 *The Law Quarterly Review* 557, 574-5.

³ HLA Hart, *The Concept of Law* (Oxford, Clarendon Press, 1961).

⁴ Described as '[One] of the most interesting and original figures in twentieth-century American jurisprudence' in G Gilmore, *The Ages of American Law* (New Haven, Yale University Press, 1977) 115 footnote 11.

⁵ KN Llewellyn, *Jurisprudence: Realism in Theory and Practice* (New York, Routledge, 2008), originally published in 1962.

⁶ W Twining, *Karl Llewellyn and the Realist Movement*, 2nd edn (New York, Cambridge University Press, 2012) 149. This second edition contains an Afterword by Twining, which provides a re-assessment of some aspects of Llewellyn's works as well reviewing academic commentary since the publication of the first edition in 1973.

presence in the different parts of the United Kingdom and in the different parts of the island of Ireland anticipated, on the one hand, devolution in the UK and, on the other, closer cooperation in pursuit of peace and justice through the Belfast (or Good Friday) Agreement of 1998.

Then, towards the end of the millennium, the OU Law School had its beginnings. The teaching of Law as a degree in its own right has seen it become, in its first twenty years, the biggest law school by student numbers in Europe. Its first undergraduates learned about European Union jurisprudence as a key source of UK law. The most recent, after 31 January 2020, are graduating after the UK has left the European Union. Few could have anticipated this development with its immense ramifications for the law in, and the different legal systems of, these islands. It has been quickly followed by an even bigger shock as the Covid-19 pandemic of 2020 led to an astonishing turn of events, in which many people all over the world were confined to their homes. We consider the effects of this and other aspects of the pandemic in a jurisprudential context in the Sections which follow.

1.1 'What officials do ...'

In this chapter, and in contrast, surprisingly, to Twining himself in this context,⁷ we take seriously Karl Llewellyn's two statements, which appeared in the original edition of *The Bramble Bush* published in 1930,⁸ that '*What these officials do about disputes is, to my mind, the law itself*' and that '*rules are ... important ... in so far as they help ... see or predict what judges will do or so far as they help ... get judges to do something. ... That is all their importance, except as pretty playthings.*' (Llewellyn's emphasis).⁹ We refer hereafter to these two statements collectively as 'What officials do ...', since the second of these two statements is relevant to Llewellyn's defence of his first statement. The primary (but not exclusive) emphasis in what follows will, however, be placed on the thirteen words contained in the first statement in 'What officials do ...' which we contend contains an important kernel of truth.

As Section 2 describes, 'What officials do ...' became the subject of a torrent of criticism which began in the 1930s and continued into the 1950s and beyond, not least by HLA Hart. These words were subsequently reconsidered by Llewellyn in his Foreword to the subsequent 1951 edition of *The Bramble Bush*, under a section entitled '*Correcting an error: 'What these officials do about disputes ...'*'.¹⁰ That correction has wrongly been put forward by some commentators (including Twining) as amounting to their retraction or repudiation by Llewellyn. However, 'What officials do ...' was left standing by Llewellyn in the main body of the text of the 1951 edition of *The Bramble Bush* notwithstanding that correction and was neither retracted nor repudiated by him although it was significantly qualified in the Correction.

We consider in some detail in Section 2 the nature of the criticisms which were made of 'What officials do ...' and the terms in which those words were qualified by Llewellyn. We contend, firstly, that those criticisms took those words out of the true context in which they were used in Chapter 1 of *The Bramble Bush*, which was that of judicial decision-making and reasoning in court cases and their enforcement by others. Even here, 'What officials do ...' reflected the

⁷ See Section 2 below.

⁸ KN Llewellyn, '*The Bramble Bush: Some Lectures on Law and Its Study*' (Privately printed edition, 1930) 3. This edition, to which we refer hereafter as 'the 1930 edition' was printed in 1930 and described in the frontispiece as "a tentative printing for the Use of Students at Columbia School of Law, New York". The 1930 edition was reproduced in *Karl Nickerson Llewellyn on Legal Realism* (Birmingham, Alabama, The Legal Classics Library, 1986). This was also privately printed, in this case for the members of the Legal Classics Library.

⁹ KN Llewellyn, *The Bramble Bush: On Our Law and Its Study*, 2nd edn (Dobbs Ferry, New York, Oceana Publications, 1951) 12 and 14. Save where otherwise stated, references hereafter to *The Bramble Bush* are to the 1960 printing of the 1951 edition, the last printing published in Llewellyn's lifetime and which contained an addition to Llewellyn's footnotes. The latest edition (KN Llewellyn, *The Bramble Bush: The Classic Lectures On the Law and Law School* (New York, Oxford Publishing Inc, 2008)) adopts a new title with a new Introduction and Notes by Steve Sheppard.

¹⁰ *Ibid.*, 3.

importance of the institutional context in which court decisions were made by judges and the underlying reasons for those decisions were given.

1.2 The ‘Law-Jobs’ and ‘Law and Government’ Theory

Secondly, we argue in Section 3 that ‘What officials do about disputes ...’, which was not intended by Llewellyn as a conceptual definition of law, has a wider institutional and societal context beyond simply the way in which judges decide court cases and the way in which those decisions are enforced. That context is the role which various groups in society (including, for these purposes, legal officials, legislators, government, executive and administrative officials) play and the ways which they adopt in, amongst other things, seeking to resolve ‘trouble cases’ which would otherwise frustrate or impair the operation of society as a larger group as a whole. ‘What officials do ...’ is therefore of significant importance in the wider jurisprudential and sociological perspective which Llewellyn adopted in setting out his ‘law-jobs’ theory in *The Cheyenne Way*¹¹ and ‘The Normative, the Legal and the Law Jobs: The Problems of Juristic Method’.¹² This theory embodied what Llewellyn later came to designate as the theory of the single institution of ‘law-government’ or ‘law-and-government’ in ‘Law and the Social Sciences – Especially Sociology’.¹³

1.3 ‘Law-Jobs’, ‘Law-Government’ and Covid-19

In Section 4, we use this institutional theory of ‘law-government’ as a jurisprudential framework to examine and evaluate various aspects of official behaviour in the UK in relation to the Covid-19 lockdown. These aspects are very wide and diverse indeed. They can encompass, amongst other things, the authority and actions of legal, parliamentary and administrative bodies in formulating and implementing policy, the use and interpretation of legislation and regulations, the role of governmental guidance and the advice of public bodies which contributes to both that guidance and the formation of public health policy generally, enforcement of legislative rules and regulations by the police, the actions of local authorities, differences of approaches between the Four Nations, human rights, and the role, impact and effect of public opinion in the formulation and enforcement of the relevant rules and regulations.

The Covid-19 pandemic has had a widespread and, in some cases, a devastating effect on public health. The restrictions imposed from time to time, including lockdown, have in turn had significant adverse economic effects as well as an impact on the well-being of individuals. We conclude in Section 5 that the jurisprudential insights afforded by the evaluation of institutional behaviour in reaction to the Covid-19 pandemic through the framework of the ‘law-jobs’ theory demonstrates the continuing relevance of the statement ‘What officials do ...’ to Llewellyn’s notion of the ‘law-government’ institution, which remains of importance in jurisprudence today. The Covid-19 pandemic may therefore have a significant effect on thinking in jurisprudence, just as the cataclysmic events of the Second World led to the revival of Natural Law theory. The ‘new normal’ for teaching jurisprudence, and for writing jurisprudentially, is therefore going to be different to the way in which we thought about law before lockdown.

2. ‘What Officials do ...’

Since we attach such importance to the words ‘What officials do ...’, it is incumbent upon us to explore and examine in some detail not only the reasons why those words gave rise to

¹¹ Karl N Llewellyn and E Adamson Hoebel, *The Cheyenne Way* (Norman, University of Oklahoma Press, 1941).

¹² KN Llewellyn, ‘The Normative, the Legal and the Law Jobs: The Problems of Juristic Method’ (1940) 49 *Yale Law Journal* 1355.

¹³ Karl N Llewellyn, ‘Law and the Social Sciences – Especially Sociology’ (1949) 62 *Harvard Law Review* 1286.

such debate in the first place but also Llewellyn's answer to the criticisms which were made of them. That answer is significant here because it is of great relevance to the arguments which we advance in this chapter.

2.1 The Criticism

The words 'What officials do ...' appeared in the original 1930 edition of *The Bramble Bush*,¹⁴ which consisted of introductory lectures to students at Columbia Law School on the study of law. As such, those lectures were essentially pedagogic in nature and the first lecture contained what might best be described as rhetorical flourishes in prose which, amongst other things, were designed to 'shock' students out of any notion of the study of law as consisting simply of the rote learning of rules of law. Indeed, Llewellyn stated in the Preface to the 1930 edition¹⁵ (which was subsequently incorporated in the Foreword to the 1951 edition)¹⁶ that *The Bramble Bush* was intended not as a primer type of introduction but as a standing introduction, which must 'invite, excite, to a second reading, and a third and fourth; each reading in the measure that the student has moved on into the law and gained the wherewithal to read, must introduce him further' and 'must cut as deep as its author has wit and strength to go'.¹⁷ Here, it may be noted that HLA Hart's *The Concept of Law*¹⁸ was also based on introductory lectures in jurisprudence¹⁹ for undergraduate students with, amongst other things, the pedagogic aim of discouraging the belief that a book on legal theory is primarily a book from which one learns what other books contain, which Hart considered to be of very small educational value.²⁰ Both *The Bramble Bush* and *The Concept of Law* came to have a wider general significance in jurisprudence beyond their authors' intended status of those books as introductory texts.

The second statement in 'What officials do', namely that '*rules* are ... important ... in so far as they help ... see or predict what judges will do or so far as they help ... get judges to do something. ... That is all their importance, except as pretty playthings' contained an element of rhetorical flourish. The first statement, '*What these officials do about disputes is, to my mind, the law itself*' did not, although, as we will see below, Llewellyn admitted that it was incomplete in itself. Both statements caused great controversy. This controversy arose in the general context of attacks against scientific naturalism and pragmatism. Scientific naturalism emphasised behaviourism and empirical, particular and experimentally verifiable knowledge and sought to deny any notion of absolute knowledge based on moral or ethical *a priori* knowledge gained through moral or ethical reasoning.²¹ That attack was also an attack against Legal Realism, which was seen as embodying the natural scientific and pragmatic approaches,²² and also against Llewellyn himself. Within the sphere of jurisprudence, in the eyes of natural lawyers and others,²³ Legal Realism, and particularly Llewellyn's words, attacked the existence of rules and the role and method of deductive logic in judicial reasoning.²⁴

This had, in the eyes of those critics, the effect of denying the existence of not only any notion of certainty in legal cases but also the traditional inherent ethical and democratic values which were to be found in the US legal systems and which were embodied within the concept of the

¹⁴ See Section 1 n8 above.

¹⁵ Ibid, vii.

¹⁶ See Llewellyn, *Bramble Bush*, 7.

¹⁷ Ibid.

¹⁸ 1st edn (Oxford, Clarendon Law Series, OUP, 1961).

¹⁹ See Leslie Green's Preface to Hart, *Concept of Law*, 3rd ed (Oxford, Clarendon Law Series, OUP, 2012) xi.

²⁰ Hart, *Concept of Law*, 1st edn (1961), vii.

²¹ See, generally, Edward A Purcell, *The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value* (Kentucky, The University Press of Kentucky, 1973) Chapter 2 'Naturalism and Objectivism', 15.

²² Ibid, Chapters 5 'The Rise of Legal Realism' and 9 'Crisis in Jurisprudence', 74 and 159.

²³ Including Fuller, Dickinson, Goodhart, Kantorowicz, Kocourek and Roscoe Pound - see Llewellyn, *Bramble Bush*, 1951 edn, 10.

²⁴ See Llewellyn, *Bramble Bush*, 10.

rule of law. Instead Llewellyn and the legal realists supposedly replaced the rule of law with the rule of judges, with judicial decisions being based on the prejudices and psychological inclinations of individual judges.²⁵ Accordingly, in the views of many of its opponents, Legal Realism was essentially amoral in its approach and either dismissed or took no account of the traditional democratic and general societal values embodied within the US legal system and other legal systems within western societies.²⁶ As will be seen in Section 2.2, however, such accusations against Llewellyn himself were essentially misplaced and unjust.

2.2 Llewellyn's answer

These attacks led to Llewellyn including, in his Foreword to the 1951 edition of *The Bramble Bush*, a section headed, in a rather dramatic style and emphasised in italics, '*Correcting an Error: What these officials do about disputes*'.²⁷ In that section, Llewellyn states that these are 'plainly unhappy words when not more fully developed and at best a very partial statement of the whole truth':

'For it is clear that one office of law is to control officials in some part, and to guide them even in places where no thoroughgoing and control is possible, or is desired. And it is clear that guidance and control *for* action and by others than the actor cannot be had out of the very action sought to be controlled or guided.'²⁸ (Llewellyn's emphasis)

This statement has been described as a retraction of the words 'What officials do ...' by Twining²⁹, and Hart³⁰ and Duxbury³¹ and as having been withdrawn by Postema.³² However, we argue that Llewellyn did not retract nor withdraw those words although he *did* significantly qualify them in the Foreword to the 1951 edition (as, indeed, he also did in *The Bramble Bush* itself as we describe below). Nevertheless Llewellyn stated that he had let those words stand in the 1951 edition as they were both useful and true in so far as:

'The words pose the problem of reform of institutions and press upon us the external problem of the need for personnel careful upright and wise. They signal the possibility of differential favouritism and prejudice on the one hand; the possibility, on the other, of much good being brought out of an ill-designed and limping machinery of measures.'³³

In Chapter V of *The Bramble Bush* itself, Llewellyn stated that he needed to backtrack from 'What officials do ...' in Chapter I by asserting, as a 'corrected hypothesis' that:

²⁵ Duxbury has described this portrayal as a 'caricature' and 'popular burlesque' – see Neil Duxbury, *Patterns of American Jurisprudence* (Oxford, Clarendon Press, 1997), 66-8 (originally published in 1995).

²⁶ See Purcell, *The Crisis of Democratic Theory*, Chapter 9, 'Crisis in Jurisprudence' 159.

²⁷ See Llewellyn, *Bramble Bush*, 8.

²⁸ Llewellyn, *Bramble Bush*, 9. The phrase 'one office of law' may here be taken to mean one role, function or purpose of law.

²⁹ William Twining, *Karl Llewellyn and the Realist Movement*, 2nd edn (New York: Cambridge University Press 2012) at 149. The second edition, cited here, contains an Afterword by Twining, which provides a re-assessment of some aspects of Llewellyn's works as well reviewing academic commentary since the publication of the first edition in 1973.

³⁰ Hart considered the two statements contained in 'What officials do ...' as extreme in their nature as they suggested that the notion of rules controlling courts' decisions was senseless, but considered that Llewellyn had 'recanted' from this position by his statements which we have set in the preceding paragraph: see HLA Hart, 'Positivism and the Separation of Law', 71 *Harvard Law Review*, 593, 616, footnote 40 and the text to which that footnote relates. This article formed the beginning of what has become known as the 'Hart-Fuller' debate. Hart did not refer to this 'recantation' in Chapter 7 of *The Concept of Law* when discussing 'rule-scepticism' but did subsequently describe Llewellyn as having retracted 'What officials do ...' although making clear at the same time that he considered Llewellyn to be one of the 'serious American jurists' despite his extravagant statements in 'What officials do' – see HLA Hart, 'American Jurisprudence through English Eyes: The Nightmare and Noble Dream' (1977) 11 *Georgia Law Review* 969, 970 and 974.

³¹ Neil Duxbury, *Patterns of American Jurisprudence*, 105

³² Gerald J Postema, Vol 11, *Legal Philosophy in the Twentieth Century: The Common Law World, of A Treatise of Legal Philosophy and General Jurisprudence* (Carolina, Springer Dordrecht, 2016) 83, n 8.

³³ Llewellyn, *Bramble Bush*, 9.

‘... law must embrace in its very heart and core what the officials do, and that rules take on meaning in life only as they aid one either to predict what officials will do or get them to do something. Or, if you prefer to state the dispute aspect of law broadly enough ... that a heart and core of living law is how disputes are in fact are settled, and that rules take on live meaning only as they bear on that’³⁴

2.3 Two significant aspects of ‘What officials do ...’

We contend that two very significant aspects attach to the passage in Chapter V of *The Bramble Bush*. The first is that ‘What officials do ...’, whether in its original form as given in Chapter I or in the form of the ‘corrected hypothesis’ in Chapter V, was never intended by Llewellyn as a conceptual definition of law. Here we agree with Twining. The second, which follows from the first, is that the ‘corrected hypothesis’ in Chapter 5 highlights what we say was in any event inherent in the form of wording of ‘What officials do ...’ in Chapter 1, namely that those words were intended by Llewellyn to highlight the institutional role which judges as individual officials of the courts played in resolving disputes and the manner in which they did so.

2.3.1 Not a Conceptual Definition

Turning to the first of these aspects, in one of his most famous papers published in the same year as the first edition of *The Bramble Bush*, Llewellyn cast strong doubt on feasibility of framing any conceptual definition of such a loose suggestive symbol as “law”.³⁵ Llewellyn observed that the overwhelming difficulty of seeking to define the periphery of the field of law was that there were so many things to be included within it and that those things were of such a disparate nature that they could not easily be fitted under one ‘verbal roof’.³⁶ Accordingly, any conceptual definition will confine that periphery in a rather arbitrary fashion, necessarily including some matters within, but excluding others from, the periphery of that field. In discussing the scope of legal realism and realistic jurisprudence, Llewellyn therefore sought instead to focus upon a point of reference to which he believed all matters legal can be most usefully referred without putting or pushing anything outside of the field or concept of law:

‘I have no desire to exclude anything from matters legal. In one aspect law is as broad as life, and for some purposes one will have to follow life pretty far to get the bearings of the legal matters one is examining’³⁷

The mistaken perception that ‘What officials do ...’ amounted to a conceptual definition of law probably contributed to the general controversy which surrounded Legal Realism and Llewellyn’s jurisprudence in the 1930s as described in Section 2.1. Llewellyn referred to that controversy as ‘a teapot tempest’ which read rather like ‘a grotesque farce’, complaining that ‘realism’, which Llewellyn maintained was an effort to achieve a more effective legal technology, had been mistaken for a philosophy. Llewellyn complained that ‘What officials do ...’ had been

‘made the scape-goat for all the sins (real and supposed) of administrators and autocrats and the ungodly in general’³⁸
and used to show Llewellyn himself

³⁴ Llewellyn, *Bramble Bush*, 75-6.

³⁵ Llewellyn, ‘A Realistic Jurisprudence – The Next Step’ (1930) 30 *Columbia Law Review* 431. See also KN Llewellyn, *Jurisprudence: Realism in Theory and Practice* (New York and London, Routledge, 2008) 3.

³⁶ *Ibid.*

³⁷ *Ibid.*, 432.

³⁸ Llewellyn, *Bramble Bush*, 9-10.

‘to disbelieve in rules, to deny them and their existence and desirability, to approve and exalt brute force and arbitrary power and unfettered tyranny, to disbelieve in ideals and particularly in justice.’³⁹

2.3.2 The institutional context of ‘What officials do ...’

Twining strongly disputed that ‘What officials do ...’ had been put forward by Llewellyn as a conceptual definition of law.⁴⁰ We agree with Twining’s assertion. Twining considered that ‘What officials do ...’ and *The Bramble Bush* were essentially a pedagogic introduction to Llewellyn’s juristic ideas addressed particularly to first year students, but did not, however, consider them as representative of Llewellyn’s work as a scholar nor as a jurist in 1930, still less of his more mature work, stating:

‘To do so would almost be akin to judging the achievement of TS Eliot on the basis of *Old Possum’s Book of Practical Cats*’.⁴¹

Indeed, in his book review of Llewellyn’s *The Case Law System in America*,⁴² Twining suggested that, on this basis, the contribution to jurisprudence of *The Bramble Bush* may be discounted.⁴³

With this assessment we respectfully disagree, while fully recognising of course, the essentially pedagogic introductory intent and nature of the text of *The Bramble Bush*. The very nature of the first statement in ‘What officials do ...’, namely ‘*What these officials do about disputes is, to my mind, the law itself*’ evokes the description of law in operation, law ‘as it is’ or law in action and the institutional role of the courts and the institutional manner in which they operate. Llewellyn’s *Präjudizienrecht und Rechtsprechen in Amerika*,⁴⁴ is regarded as a major piece of work.⁴⁵ It was based on lectures given by him at the Leipzig Faculty of Law in 1928- 9, at least one year prior to the publication of *The Bramble Bush*, although it was not published until 1933. In *Präjudizienrecht*, Llewellyn used the word ‘institution’ and ‘institutions’ in a slightly different sense to that in which he used those terms in the ‘law-jobs’ theory and in the ‘law-government’ institution. In the Leipzig lectures, Llewellyn used ‘institutions’ to refer to groups of rules and decisions of the courts and the operation and use of such groups of cases as precedents.⁴⁶ This was very similar to the way in which Llewellyn recommended that students should analyse the use of precedent in American case law in Chapter IV of *The Bramble Bush* which, in turn, presaged Llewellyn’s later description of juristic method in the ‘law-jobs theory. Similarly some parts of Chapter VII of *The Bramble Bush* presaged, albeit in embryonic form, parts of the ‘law-jobs’ theory.⁴⁷ The suggestion that *The Bramble Bush* was not representative of Llewellyn’s work as a scholar and a jurist and that its contribution which made to jurisprudence may be discounted therefore seems inaccurate despite the essentially pedagogic context in which it was written.

³⁹ Ibid.

⁴⁰ W Twining, *Karl Llewellyn and the Realist Movement*, 2nd edn (New York, Cambridge University Press, 2012) 148-50.

⁴¹ Ibid, 152.

⁴² William Twining, ‘The Case Law System in America’ (1991) 100 *Yale Law Journal* 1093.

⁴³ Ibid, 1094.

⁴⁴ Karl N Llewellyn, *Präjudizienrecht und Rechtsprechung in Amerika* (Leipzig, Theodor Weicher, 1933). An English translation of Part I, Books 1 and 2 of *Präjudizienrecht* (without the Cases and Materials in Part II) was not published until 1989 – see Karl N Llewellyn (ed P Gewirtz, trans M Ansaldi), *The Case Law System in America* (Chicago, Chicago University Press, 1989).

⁴⁵ See, for example, Paul Gewirtz’s Introduction to KN Llewellyn, *The Case Law System in America*, x footnotes 3 and 4, which lists the academic reviews of *Präjudizienrecht*, including those of Fuller – see L. Fuller, ‘American Legal Realism’ (1934) 82 *University of Pennsylvania Law Review* 429 and L Fuller, ‘Book Review’ (1934) 82 *University of Pennsylvania Law Review* 551.

⁴⁶ See KN Llewellyn, *The Case Law System in America* 10 footnote 1 and §§64 and 65, 95-8.

⁴⁷ Llewellyn described this Chapter as ‘richly unripe, but unripe’ in KN Llewellyn, *The Bramble Bush*, 107.

3. Llewellyn's 'Law-Jobs' Theory and the Institution of Law-Government

In section 1.3, we highlighted the very wide and diverse nature of the jurisprudential aspects of official and institutional behaviour which fall to be considered in relation to the Covid-19 lockdown in the UK. These aspects extend well beyond a narrow notion of 'law' which encompasses merely court proceedings, the interpretation of statutes and delegated legislation, and any Human Rights and/or constitutional issues which may arise therefrom. They include not only the enforcement of the relevant rules and regulations by the police but also the legislative and regulatory processes themselves, the practice and expectations of those persons and bodies involved in the legislative, regulatory and administrative processes (including bodies such as Public Health England (PHE) and the Scientific Advisory Group for Emergencies (SAGE) who advise on the formulation of policy in relation to public health issues), and also political advisors. Thus, the notion of 'law' in this context extends to and encompasses a whole range of disparate activities associated with the 'law', some of which would often be regarded as extending beyond what is understood as the notion of the 'legal'.

Most, but by no means all, of these aspects involve the activities of 'officials'. The officials referred to by Llewellyn in 'What officials do ...' included not only judges and lawyers but enforcement bodies such as the police and the prison service (Llewellyn's 'sheriffs' and 'jailors'),⁴⁸ a list of officials which was compiled in relation to their actions about 'disputes'. However, Llewellyn immediately followed his statement by criticising the approach to law which was based on the notion of the heart of law as comprising a set of rules of conduct enforced by external constraint,⁴⁹ laid down by the state and addressed to the people 'on the street'.⁵⁰ Llewellyn thought such an approach was misleading and that there was much to be said in some parts of the law for the view that 'rules *for* conduct' should be the focus 'quite *apart from disputes*'⁵¹ (Llewellyn's emphasis), including rules which looked not so much to disputes as to administrative convenience, and rules which looked primarily to avoiding not disputes but injuries and harm.

Accordingly, Llewellyn considered that examples of rules of conduct went not so much to the importance of rules but to 'the *non-exclusive*' importance of '*disputes*'⁵² (Llewellyn's emphasis). This led to Llewellyn making what was to him the fundamentally important observation in relation to the necessary approach to 'lawyering' (or practising what was to him the 'craft' of the law):

'And so to my mind the main thing is seeing what officials do, do about disputes, or about anything else; and seeing that there is a certain regularity in their doing – a regularity which makes possible prediction of what they and other officials are about to do tomorrow. In many cases that prediction cannot be wholly certain. Then you have room for something else, another main thing for the lawyer: the study of how to make the official do what you would like to have him'.⁵³

The rules and regulations to which Covid-19 has given rise comprise both rules *of* and *for* conduct in this sense and they have been devised for the principal purpose of protecting the health of the public and thereby minimising the harm to health caused by Covid-19. Evaluating how such rules and regulations give effect to this purpose from a jurisprudential view will therefore involve considering the activities of the full range of officials referred to above. We

⁴⁸ See *The Bramble Bush*, 12.

⁴⁹ Described by Llewellyn as such in order to distinguish them from rules of morality and some phases of custom.

⁵⁰ *Ibid*, 12-13.

⁵¹ *Ibid*, 13.

⁵² *Ibid*, 13.

consider that the 'law-jobs' theory, which embodies the notion of the single institution of 'law-government' as its integral part, provides a coherent overall jurisprudential framework and perspective for evaluating all these aspects, using Llewellyn's wider institutionalist and sociological approach.

As Llewellyn emphasised in 'A Realistic Jurisprudence – The Next-Step',⁵⁴ when discussing the limitations of a conceptual definition of law, one cannot always easily draw the line in distinguishing the 'legal' from the 'non-legal' since, depending upon one's centre of interest, matters which might otherwise be regarded as 'background', 'foreground' or 'underground' cannot easily be disregarded when discussing the 'legal'.⁵⁵ A wider perspective must then be necessary, which is provided by the 'law-jobs' theory and the institution of 'law-government'.

3.1 The 'Law- Jobs' Theory

Llewellyn primarily described this theory in in *The Cheyenne Way*⁵⁶ and his paper 'The Normative, the Legal and the Law Jobs: The Problems of Juristic Method'.⁵⁷ The 'law-jobs' were designed to address certain needs that must be met if a human group is to survive as a group and to achieve the purposes for which the group exists. He classified these 'law-jobs' into the six categories, namely (i) 'adjustment of the trouble case'; (ii) preventive channelling of conduct and expectations; (iii) 'preventative rechannelling of conduct and expectations to adjust to change'; (iv) 'arranging for the say and saying of things' – that is to say, allocation of authority and procedures for authoritative decision-making; (v) provision of direction incentives within the group (which Llewellyn referred to at the job of providing 'net Positive Drive'); and (vi) 'the job of Juristic Method'.⁵⁸

The ways in which courts and other institutions sought to address and resolve 'trouble cases' - disputes, conflicts and sources of grievance – by what Llewellyn termed as 'juristic method' in situations such the Covid-19 pandemic health crisis are best illustrated and analysed by reference to concrete situations. Accordingly, the application of the individual 'law-jobs' will be considered in detail in Section 4.

3.2 The Law-Government Institution

Twining has explained the inter-relationship between Llewellyn's theory of 'law-jobs' and the institution 'law-government' in the following terms:

'Groups which qualify to be called societies have 'institutions', more or less developed and specialised, the peculiar function of which is to perform these law-jobs'. Llewellyn's later usage 'law-and-government' (or 'law-government') is the term used to refer to such institutions. In society 'law-government' is the main but not the only institution for performing the law-jobs listed above; conversely 'the law-jobs are the main but not the only jobs of the institution of law government.'⁵⁹

The institution of 'law-government' is most clearly explained by Llewellyn in his paper 'Law and The Social Sciences – especially Sociology',⁶⁰ in which he described the concept of an 'institution' as 'the central and most important concept in social science',⁶¹ referring to the

⁵⁴ Llewellyn, 'A Realistic Jurisprudence – The Next Step' (1930) 30 *Columbia Law Review* 431.

⁵⁵ Ibid, 431-2.

⁵⁶ Karl N Llewellyn and E Adamson Hoebel, *The Cheyenne Way* (Norman; University of Oklahoma Press (1941).

⁵⁷ KN Llewellyn, 'The Normative, the Legal and the Law Jobs: The Problems of Juristic Method' (1940) 49 *Yale Law Journal* 1355.

⁵⁸ Ibid, 1375-1397.

⁵⁹ Twining, *Karl Llewellyn and the Realist Movement*, 179 n 37.

⁶⁰ Karl N Llewellyn, 'Law and the Social Sciences – Especially Sociology' (1949) 62 *Harvard Law Review* 1286.

⁶¹ Ibid, 1290, n 2.

discussion of that concept by Walton Hamilton.⁶² Hamilton describes an 'institution' in the following terms:

'Institution is a verbal symbol which for want of a better describes a cluster of social usages. It connotes a way of thought or action of some prevalence and permanence which is embedded in the habits of a group or the customs of a people. In ordinary speech it is another word for procedure, convention or arrangements.'⁶³

In his paper 'The Constitution as an Institution',⁶⁴ Llewellyn described an institution as in the first instance a set of ways of 'living and doing'⁶⁵ but subsequently amended that description by stating that 'I should today focus first upon the *jobs* to be done, around whose doing ways both get organised and take on meaning'.⁶⁶

As to the institution of 'law-government' itself, Llewellyn described it as in essence a single institution which is recognized as having the proper authority to speak for 'the 'Whole of us' or 'the Entirety' and provides the machinery for 'conscious re-kiltering, for deliberate correction, for planned cure'⁶⁷ through the performance of the 'law-jobs'. Although 'law-government' is in essence one single institution which carries out the various 'law-jobs' on behalf of a group, those 'law-jobs' will be performed at any one time by a number of separate institutions such as courts, legislators and administrators in various ways which will interact and combine with each other in forming the institution of 'law-government' as a whole. Again, in the context of Covid 19, the 'law-government' institution will be evaluated through the examination of concrete instances in Section 4.

4. Applying Llewellyn's approach to Covid-19

4.1 'Trouble-cases' and the essential job of the 'Law-government' institution

Llewellyn indicated that, in his 'law-jobs' theory, a 'trouble-case', which can consist of an offence, grievance or dispute, is typically a minor, "individual" trouble which by itself is usually 'bearable' trouble. As such it can be compared to 'garage-repair work' on the general order of the group and a trouble-case would disrupt continuance of group life only if sufficiently multiplied and sufficiently cumulative.⁶⁸ Viewed from this perspective, however, the Covid-19 pandemic is an atypical, magnified 'trouble-case' writ large in both its scope and ambit. Its widespread impact on the population throughout the UK has not only given rise to a crisis in public health but the rules and regulations enacted to counter that crisis through the implementation of lockdown and other measures have had a severe economic impact on businesses and employment. They have adversely affected the well-being of families and individuals confined to their homes and disrupted school and university education.

All of these matters have, in turn, tested the 'law-government' institution's performance of the 'law-jobs' in a number of ways and have caused that institution to be subjected to wide-ranging public scrutiny and debate. The pandemic provides in stark relief an instance of what Llewellyn described as 'the great and basic job on which the institution of 'law-government' is focused:

⁶² W Hamilton, 'Institution' (1932) *Encyclopedia of Social Science* 84.

⁶³ Ibid, cited in W Twining, *Karl Llewellyn and the Realist Movement*, 2nd edn (New York, Cambridge University Press, 2012) 176.

⁶⁴ KN Llewellyn, 'The Constitution as an Institution' (1934) 34 *Columbia Law Review* 1.

⁶⁵ Ibid, 17.

⁶⁶ This amendment was contained in the excerpt from 'The Constitution as an Institution' which was reproduced in Karl N Llewellyn, *Jurisprudence: Realism in Theory and Practice* (New York and London, Routledge, 2017), 233, footnote b (originally published in 1962 by the University of Chicago Press).

⁶⁷ Llewellyn, 'Law and the Social Sciences – Especially Sociology' 1296.

⁶⁸ Llewellyn, 'The Normative, the Legal, and the Law-jobs: The problem of Juristic Method' (1940) 49 *Yale Journal* 1375-6.

‘It is the job, for any group, for any community, for any society, of becoming and remaining and operating as *enough* of a unity, with *enough* team-work, to be and remain recognisable as a group or as a political entity or as a society. The fundamental law-and-government job is, then, the job that is fundamental to the existence of any society and any social discipline at all: it is the job of producing and maintaining the groupness of a group’.⁶⁹ (Llewellyn’s emphasis)

In the UK, court litigation by way of judicial review of the Covid-19 legislation and regulations, from the period beginning with the imposition (in England) of the first lockdown period in March 2020 to the end of the second lockdown period in December 2020, has been scarce. An exception is the *Dolan* case⁷⁰ which raised the issue of whether the lockdown restrictions imposed by regulations 6 and 7 of the Public Health Act (Control of Disease) Act 1984 were *ultra vires* and/or in breach of the rights to liberty, respect for private and family life and to freedom of assembly and movement under Articles 5, 8 and 11 respectively of the ECHR.⁷¹

‘Trouble-cases’ arising under the Covid-19 restrictions may, however, be dealt with by the intervention of institutions other than the courts and, indeed, by means other than the regulations imposing those restrictions. Thus, for example, where members of more than one household meet inside or outside a particular property, they may cause nuisance and disturbance to immediate neighbours as well as being in breach of those restrictions. In that event, the local authority may intervene to prevent such an assembly on the grounds of noise, nuisance or disturbance, irrespective of whether there has been any intervention by the police on the grounds of a breach of the relevant Covid-19 restrictions.⁷²

4.2 Separate Institutions within the Single Institution of ‘Law-government’

The last example given in section 4.1 illustrates two important facets of Llewellyn’s concept of the ‘law-government’ institution. Firstly, that institution, although a single institution in itself, can embrace under its umbrella a number of separate groups or institutions in their own right beyond the courts themselves. They extend to institutions (as defined in Section 3.2 above) such as the government, the legislature, the police, local authorities and all other bodies which have separate regulatory, enforcement or administrative functions.

The second facet is that the overall effectiveness of the ‘law-government’ institution will often depend on the way in which those separate institutions interact.⁷³ Their functions, which

⁶⁹ See Llewellyn, ‘Law and the Social Sciences – especially Sociology’, 1292.

⁷⁰ *Dolan v Secretary of State for Social Care* [2020] EWHC 1786 (Admin). An appeal against that decision was heard on 29 and 30 October 2020, in which was argued that the UK’s lockdown rules were among ‘the most onerous restrictions to personal liberty’ in almost four centuries. At the date of writing, its outcome was unknown – see R. Craig, ‘Coronavirus Regulations Case reaches the Court of Appeal - Hearing Dates 29-30 October 2020’ (*UK Constitutional Law Blog*, 28 October 2020) <ukconstitutionallaw.org> and also Jonathan Ames, ‘Simon Dolan: Coronavirus lockdown restrictions were unlawful, entrepreneur tells judges’ *The Times* (London, 30 October 2020).

⁷¹ Similar arguments have consistently been raised by Jonathan Sumption QC, the retired Supreme Court Justice, who has maintained that it “is our business, not the state’s, to say what risks we will take with our own health.” – see ‘Lord Sumption: The only coherent position is locking down without limit – or not locking down at all’ *Prospect* (London, 26 May 2020) (in reply to Professor Thomas Poole, ‘A new relationship between power and liberty’ *Prospect* (London, 23rd May 2020) and his Cambridge Freshfields Annual Lecture ‘Government by decree – Covid-19 and the Constitution’ (Cambridge, October 2020) <www.youtube.com/watch?v=amDv2gk8aa0>.

⁷² Such an instance arose within the personal experience of one of the co-authors of this chapter, who lives in a small close of houses, comprising a mixture of both tenanted and privately owned houses facing on to a central communal lawn. One neighbour began to hold regular parties on the communal lawn to which he invited people who were not residents in the close. Those parties sometimes lasted until late at night, causing nuisance and annoyance to other neighbours. The parties were in flagrant breach of the Covid-19 regulations then in force but there was no intervention by the police. The parties were eventually stopped through the intervention of a Housing Officer of the local authority concerned.

⁷³ Llewellyn, ‘Law and the Social Sciences’, 1290.

comprise the totality of the 'law-government' institution, will often overlap. In the particular context of the UK, there are four political systems and three legal systems.⁷⁴ Wales, Scotland and Northern Ireland each possess separate devolved institutions of government and powers. Each have adopted different responses to the pandemic. Their responses will inevitably vary in accordance with the political composition of the elected representative bodies in each political system with, for example, different restrictions being applied in Wales and England, even though both of those countries share one legal system. Different periods of lockdown have been announced from time to time in each country. The introduction of the tier system in selected areas and regions within each country complicates the position further. It is, however, noteworthy that before announcing the ending of the second period of lockdown in England and the new tier system to follow in December 2020, the Government consulted with each of the devolved administrations in Wales, Scotland and Northern Ireland over the nature of the relaxation of restrictions which were to be applied over the Christmas period. This demonstrates the degree of overlap which can occur within the overall institution of 'law-government'.

The precise 'legal'⁷⁵ nature of the various separate bodies or institutions which together comprise the single institution of 'law-government' will also vary according to the functions of each body. In England, for example, the Government has sought the advice and recommendations of PHE⁷⁶ and SAGE⁷⁷ for medical and scientific advice in relation to the precise nature of the restrictions which are necessary to reduce the rate and spread of infection of Covid-19. Such advice assists the Government in deciding the precise form and substance of both the necessary legislative measures and regulations and the guidance which should be published by way of advice to the public on their effect.⁷⁸

Individually the roles of the Government, PHE and SAGE might be taken to represent what Llewellyn has described as the 'government' pole within the institution 'law-government'. However, in so far as the roles of SAGE and the Government combine in this context to produce legislative measures and regulations, those roles also tend towards what Llewellyn describes as the 'law' pole within that institution.⁷⁹

The importance of the role of Sage, in particular, as part of the institution of 'law-government' has been recognised by the expression of two concerns. There is concern, first, as to the need to review the transparency and independence of the scientific advice provided by SAGE.⁸⁰ Secondly, there is concern as to the potential legal and democratic challenge arising from any

⁷⁴ The legal systems of England and Wales, Northern Ireland and Scotland.

⁷⁵ See, in relation to the notions or concepts of 'law-stuff' and 'legal' generally, Llewellyn, 'The Normative, the Legal, and the Law-jobs: The problem of Juristic Method' (1940) 49 *Yale Journal* 1358.

⁷⁶ Public Health England, is an executive agency of the Department of Health and Social Care. Its responsibilities of PHE include advising government and supporting action by local government, the NHS in preparing for and responding to public health emergencies – see Public Health England, 'About Us' (GOV.UK, n.d.) <<https://www.gov.uk/government/organisations/public-health-england/about>>. The Government has announced that it will be replaced with a new organisation called the National Institute for Health Protection (NIHP).

⁷⁷ The Scientific Advisory Group for Emergencies, whose aims and objectives are to make sure that timely and coordinated scientific advice is made available to decision-makers to support UK cross-government decisions in the Cabinet Office Briefing Office Room (COBR) - see Cabinet Office, *Enhanced SAGE Guidance; A Strategic Framework for the Scientific Advisory Group for Emergencies (SAGE)*, Part Two (London, 2012) para 16. The current group is, at the date of writing chaired by the Government Chief Scientific Adviser, Sir Patrick Vallance, and the Chief Medical Officer, Professor Chris Whitty, and includes experts from within government and leading specialists from the fields of healthcare and academia.

⁷⁸ The status of the 'rules' set out in such guidance is often unclear to both the public and officials. The concept of 'social distancing', for example is not mandated by law but is one of the most basic elements of the Government responses to the pandemic.

⁷⁹ See Llewellyn, 'Law and the Social Sciences', 196-7.

⁸⁰ See N Weinberg and C Pagliari, 'Covid-19 reveals the need to review the transparency and independence of scientific advice' (*UK Constitutional Law Blog*, 15 June 2020) <ukconstitutionallaw.org/>.

claim that the Government is deflecting political responsibility and accountability for the measures imposing lockdown restrictions by claiming that is only 'following the science'.⁸¹

The degree to which the Government acts upon SAGE's advice may almost inevitably vary at different stages of the pandemic because it also has to weigh in the balance other considerations such as political factors (for example, the economic effects on businesses and employment as well as the effect on different sections of the public at large) in deciding both the timing and nature of any restrictions which are to be imposed.⁸² This is unsurprising as some conflict of view or tension may always exist between the separate groups or institutions which together comprise the larger single institution of 'law-government' as a whole.⁸³ Those individual groups may have different views as to how, in any single instance such as the Covid-19 pandemic, the essential job of producing and maintaining the groupness of the 'Entirety' should be performed. Those views will be based on the specialist skills of the individuals who comprise the separate group performing a particular function within the larger essential job of the single 'law-government' institution as whole. As Llewellyn stated of the institution of law in *The Bramble Bush*, each institution by its very nature tends to possess:

'a type of ethnocentric and chronocentric snobbery – the smugness of your own tribe and own time: *We are the Greeks; all others are barbarians.*'⁸⁴

4.3 The Role of Public Support and Opinion

The essential job of the 'law-government' institution, that of producing and maintaining the groupness of the 'Entirety', requires the overall support of that 'Entirety' – that is to say, the public – in order to do so. Public support will therefore play an important role in promoting that groupness. Divisions and frictions within the 'Entirety' may therefore impair the attempt to achieve that groupness⁸⁵ and thus the carrying out of the 'law-job' of 'Net Drive'. That 'law-job' combines the three law-jobs of the adjustment of the 'trouble-case', 'channelling' and the 'Saying' (through legislation and court cases) in promoting the positive direction of achieving the health and balance of the 'Entirety'.⁸⁶

Since any institution comprises a group of individual officials, the behaviour of those individual officials within the sphere of the 'law-government' institution may on occasion also impair both the operation of the 'law-job' of Net Drive and the authority of the institution of which they are part.

In the context of Covid-19, there have been a number of well-publicised instances of such behaviour which have adversely affected public opinion and support for lockdown policies and other restrictions. These include the visit to Durham and Barnard Castle by Dominic Cummings, the Chief advisor to the Prime Minister until his resignation in November 2020,

⁸¹ See L Trueblood, 'Following the Science', a Legal and Democratic Challenge' (*UK Constitutional Law Blog*, 21st Sept 2020) <ukconstitutionallaw.org/>.

⁸² See, for example, Andrew Woodcock, 'Coronavirus: Scientific: adviser warns Boris Johnson action to beat the disease must be 'fast and hard'' *The Independent* (London, 16 October 2020, in which it was revealed that SAGE had recommended in September that the country should go into a time-limited 'circuit breaker' lockdown to prevent the resurgence of the outbreak of Covid-19 but that advice was not acted upon by the Government.

⁸³ See, by way of an example of such potential tension, BBC News, 'Covid: London likely to move to tier 3 amid rising rates' *BBC News* (London, 14 December 2020).

⁸⁴ Llewellyn, *The Bramble Bush*, 40-1.

⁸⁵ In the UK context of the Covid-19 Pandemic, examples of such division and factions may be found in the anti-lockdown protests in London in December 2020 (see BBC News, 'Covid: More than 150 arrests at London anti-lockdown protest' *BBC News* (London: 28 November 2020) and the party political divisions arising from the grievances of those living in rural areas with a low rate of Covid-19 cases but which have been included in a higher tier of restrictions because of their proximity to cities and towns which have a much higher rate of such cases – see for, example Danielle Sheridan, Gordon Raynor and Laura Donnelly, 'Villagers offered escape routes from toughest tiers' and 'MPs battle to get villages 'decoupled' from hotspots' *Daily Telegraph*, 28 November 2020.

⁸⁶ Llewellyn, 'The Normative, the Legal and the Law-Jobs' 1387-95.

during the first period of lockdown;⁸⁷ two visits by Dr Catherine Calderwood, the Chief Medical Officer in Scotland, and her family to their second home in breach of Regulation 5 of The Health Protection (Coronavirus) (Protection) (Scotland) Regulations 2020;⁸⁸ and the conduct of Margaret Ferrier, the Scottish MP for Rutherglen and West Hamilton, who had previously raised questions in Parliament about Dominic Cummings' visit to Durham. Having displayed Covid-19 symptoms and taken a Covid-19 test, she travelled by train to London in September 2020 while awaiting the test result, and then travelled back by train after speaking in the House of Commons and receiving a positive test result.⁸⁹ It has been claimed that the example of Dominic Cummings' Durham visit undermined the public's trust in those restrictions.⁹⁰

5. Conclusion

The examples cited in Section 4 demonstrate the applicability of both Llewellyn's 'law-jobs' theory and the single institution of 'law-government' and the phrase 'What officials do ...' to the events of the Covid-19 pandemic in the UK. We therefore argue that they support each of the contentions which we set out in Section 1 as to the jurisprudential significance of the words 'What officials do ...' even in its corrected form in Chapter 5 of *The Bramble Bush* and the Foreword to the second edition of that book.

Those words are relevant to the wider institutional and societal context beyond merely that of the way in which judges decide court cases, the reasons which judges give for making their decisions and the way in which court cases are used as precedents in subsequent cases as Llewellyn described in *The Bramble Bush*. That wider institutional and societal context consists of Llewellyn's wider sociological approach or perspective as embodied on his 'law-jobs' theory and the institution of 'law-government'. In turn, that theory and institution, together with the words 'What officials do ...', provide an extraordinarily useful framework for a jurisprudential evaluation of such events as the Covid-19 pandemic and its widespread social effects.

We have therefore concluded that they remain of continuing relevance and significance in jurisprudence today. They reinforce the need to merge jurisprudential thinking about law, politics, and changing medical and wider scientific advice. As such, we conclude that Llewellyn's institutional analysis from this wider sociological context bears an importance in jurisprudence which is equal to that afforded by any of the Hart-Fuller, Hart-Devlin and Hart-Dworkin debates and should therefore lead to a resurgence of interest in his jurisprudential insights.

This chapter is, we hope, a contribution to the opening-up of the wisdom of Llewellyn as we come towards the centenaries of significant events in his legal thinking. That wisdom, together with the valuable insights to which it gives rise, will, we feel, be of great relevance to lawyers, sociologists and other academics in helping us contribute to advancing the concept or idea of social justice, which forms such an important part of the Open University's Mission Statement.

⁸⁷ See BBC News, 'Cummings drove to Barnard Castle 'to test vision'' *BBC News* (London, 25 May 2020).

⁸⁸ See BBC News, 'Coronavirus: Scotland's chief medical officer resigns over lockdown trips' *BBC News* (Edinburgh, 5 April 2020).

⁸⁹ See Greg Heffer, 'Coronavirus: MP Margaret Ferrier who travelled with COVID will face no further action from Met Police' (London, 15 October 2020). The Speaker of the House of Commons, Sir Lindsay Hoyle, described his reaction as one of 'complete shock that somebody could be so reckless'.

⁹⁰ See Leonie Chao-Fong, 'People are using Dominic Cummings as an excuse to get out of coronavirus fines' *Huffington Post* (UK Edition, 11 November 2020). That post claims that seven appeals against fixed penalty notices served under the Covid-19 regulations between March and October 2020 referred to Cummings by name and cites a YouGov poll following the revelations which showed a fifth of Britons followed lockdown rules less strictly than before with a third citing the adviser's actions as justification for their own breaches of those rules. See also M. Gordon 'Dominic Cummings and the Accountability of Specialist Advisors' (*UK Constitutional Law Blog*, 3rd June 2020) <ukconstitutionallaw.org>.

Concluding Thoughts

Chapter 13

50 years of Clinical Legal Education: Looking Back to the Future

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Abstract

This chapter considers the past, present, and future of clinical legal education (CLE). Reflecting on the history of clinical legal education in the UK and beyond, the chapter traces the rise in experiential learning to consider its role in both the promotion of the values of social justice and the educational benefits for students. It considers the place of clinical legal education within the law curricula and advocates for exploring new ways of conceiving how we deliver clinical programmes. The chapter offers insights into emerging trends in CLE and addresses the prospect of UK law schools' increased reliance on clinical programmes as a result of changes to the training and qualification of solicitors in England and Wales.

1. Introduction

In Roman mythology Janus, the doorkeeper of the heavens, presided over all forms of transitions, including doorways and beginnings and endings. King of Latium (a region of central Italy), he is often depicted as having two heads, one looking backwards whilst the second simultaneously looks forward (Davenport, 2017). Likewise, this chapter attempts to frame the contemporary practice of CLE in UK law schools both by looking backwards at the history of CLE, particularly over the last 50 years, and by looking forwards to consider what the future might hold for CLE in the next half century.

The metaphor of Janus is particularly resonant for CLE as it frequently occupies the centre ground between different views and positions within legal education more generally. For example, CLE is often the front line of discussions within law schools about whether the undergraduate law degree should be a purely academic undergraduate discipline or professional training for a legal career. There is also debate amongst clinicians as to whether the aim of CLE is to offer social justice (in the form of access to justice to the public) or to be of educational benefit to students through the development of their skills, particularly their employability skills (Drummond and McKeever, 2015). The response of UK CLE practitioners to these issues has often been distinct from those of the US pioneers of the movement, and these nuances will be explored in this chapter.

The definition of clinical legal education itself is contested and it is difficult to find one definition agreed upon by everyone (Kerrigan and Murray, 2011). Many academics based in the USA, Canada, Australia and Africa define CLE as involving students working in a law clinic which provides legal advice and information to a group in society who are underprivileged or lack access to a legal system (for example, Winkler, 2013; Giddings, 2008; Thomson, 2014). Within the UK there is generally a broader definition of CLE as being 'learning by doing': a learning environment where students identify, research and apply knowledge in a setting which replicates the world in which law is practiced (Grimes and Gibbons, 2016). This experiential approach exposes students to real or realistic legal issues and problems through

different activities including simulation activities, advice clinics, placement or externships, or Street Law projects where students provide public legal education to members of the public (Grimes and Gibbons, 2016; Kerrigan and Murray, 2011). This lack of agreement on an overarching definition reflects the wide variety of practices and projects within CLE as well as the different contexts within which CLE has developed in individual countries. We will first consider the foundations of CLE in the USA.

2. The History of Clinical Legal Education

2.1 The birth of the CLE movement in the USA

CLE first developed in the USA in the 1930s, at which time US law schools had offered postgraduate legal study for students to qualify as attorneys for around 60 years. Prior to the 1870s, most US attorneys qualified through an apprenticeship. In 1870 Harvard Law School introduced the case method of instruction, where students studied a section of appellate opinions and distilled the legal principles from them using the 'Socratic' method of classroom teaching (Grossman, 1973). Other law schools followed this example and qualification as an attorney by postgraduate study became the accepted norm.

This case method was criticised in the 1920s by legal realists, who stressed the importance of law students understanding the interactions of society and the work of courts and lawyers to understand how the law and legal profession actually function in a society (Frank, 1933). Jerome Frank and Karl Llewellyn urged law schools to equip students with the ability to adapt to a rapidly changing legal environment and to use their legal knowledge in practice, recommending the establishment of legal clinics in law schools (Frank, 1933; Llewellyn, 1945; Grossman, 1973). This led to the introduction of simulated practice courts in the 1950s, and the establishment of law clinics from the 1960s onwards (Grossman, 1973).

2.2 50 years of expansion

The growth of law clinics has been particularly marked over the last 50 years, both in the USA and beyond. In the USA this growth was due primarily to two factors. Firstly, governmental funding was made available for law clinics from the 1960s onwards, following which philanthropic organisations and alumni donations maintained the income required to staff and run law clinics in law schools (Joy, 2012). The second factor was the USA government's 'War on Poverty', which focused attention on the need to provide legal services for those who could not afford legal representation (Grossman 1973). Both in the 1960s and now, there is no comprehensive legal aid system in the USA; state funding is provided in criminal cases through the public defender's office and court appointed advocates, with no automatic right to civil legal aid (UNODC, 2016). Most of the privately funded legal services are targeted at the wealthiest 20% of the population, with some limited legal aid available for the poorest in society (Kemp, 2016). Therefore, American middle-income earners, as well as poor and marginalised communities, lacked access to legal advice and representation (Kemp, 2016). In the 1970s the American Bar Association estimated that the middle 70% of society were not getting their legal needs met (Orsi, 2013). This remains the situation fifty years on today where over 85% of the civil legal problems reported by low-income Americans received inadequate or no legal help (Kemp, 2016; Legal Services Corporation, 2017) There was therefore significant unmet legal need in the USA fifty years ago and the development of law clinics through the clinical movement was a significant contribution to the provision of legal advice and representation which promoted social justice for the American public. Within this context, we can see why nearly all of the early writing relating to the establishment of CLE focused on community service and social justice as being the main objective, with the educational benefit for students being secondary (Grossman, 1973).

In the 1970s the CLE movement also started to inspire the establishment of programmes in other countries around the world: initially in Canada, Australia, the UK, and South Africa (Winkler, 2013). The next section will consider the reasons for the spread of CLE to other countries, before examining the history of CLE in the UK.

2.3 The growing global influence of CLE

Following the development of the clinical movement in the USA, the first countries to establish law clinics as part of a CLE programme in universities were Canada (in 1971), South Africa (in 1972), the UK (in 1973) and Australia (in 1975) (Winkler, 2013). In Canada, South Africa and Australia, their social and political contexts ensured that social justice was, as in the USA, an important influence in establishing law clinics to ensure access to justice and the courts for the most marginalised and poorest of citizens.

Since 2000 there has been a much greater development of CLE across the globe (Giddings, 2008). CLE expanded to a number of countries in the global south to supplement the work of national legal aid bodies in assisting communities to access justice (McQuoid-Mason, 2011). At the same time CLE pedagogy began to influence law schools in Russia and Eastern Europe following the collapse of the USSR (Winkler, 2013). CLE programmes in these countries tended to focus on issues such as the rule of law, human rights, and democracy; possibly due to the establishment of new democracies and legal systems following the overturning of old regimes (Winkler, 2013).

By contrast the UK's 50-year development of CLE programmes has taken a slightly different form, as it responded to its own political and social context and in particular the availability of state funded legal advice and representation.

2.4 50 years of CLE in the UK

The development of CLE in the UK reflected its distinct social and economic context. In common with the USA, before the mid-1800s most solicitors and barristers qualified following a period of apprenticeship, although when English law was introduced into university education from the 1850s onwards it was as an undergraduate subject. English law degrees did not adopt the same narrow educational focus as US law schools and instead stressed their academic status incorporating a liberal arts approach (Slapper, 2011). As qualification routes developed in the Victorian period, the existing division of training into academic, vocational, and work experience stages was formed with the undergraduate law degree focusing on the academic stage. Nevertheless, law schools were aware that many of their law graduates went on to the vocational training stage and qualified as solicitors or barristers, which led to a tension developing in law schools as to whether they were teaching a purely academic undergraduate degree or equipping students for their subsequent professional training (Goldfarb, 2012).

Following the Second World War the UK government introduced as part of the welfare state, state funded legal advice and assistance for both civil and criminal law issues, through the Legal Aid and Advice Act 1949. This paid the legal fees of solicitors and barristers for both legal advice and representation. A number of not-for-profit advice agencies and Law Centres also sprang up, funded by local authority grants (Kemp, 2016). Over the next forty years the legal aid scheme expanded until most legal issues were covered and by 1996/7 the net legal aid cost (after contributions from assisted person) was £1476 million a year from a total government spend of £330 billion (Rickman et al, 1999; H M Treasury, 1998). Individuals who could not afford legal fees could seek advice on most legal issues from advice agencies, legally aided solicitors, or law clinics (Pleasence, 2004). This meant there was not the level of unmet legal need seen in the USA and other countries, so the social justice imperative for the introduction of CLE in the UK was arguably not as influential.

The University of Kent introduced the first law clinic in a UK university in 1973, closely followed by the University of Warwick in 1975, initially aimed at university students but then opened to members of the public in the surrounding areas (Winkler, 2013). However, within a few years the clinics had either closed or separated from the university law school due to disagreements over the role of the clinic (Winkler, 2013). In the 1980s there were just four university law clinics in existence in the UK: Birmingham, Warwick, South Bank and Northumbria (Kemp, 2016). These early adopters of CLE were explicit that the reason for their clinical activities was the educational benefits for the students, rather than being driven by a commitment to provide legal services for the public who could gain legal advice from government-funded schemes (Winkler, 2013).

CLE started to gain traction in the UK in the 1980s following publications from educational theorists, who stressed the importance of experiential learning for students. These developed ideas in the tradition of the early twentieth century philosopher John Dewey who emphasised the importance of experience-based learning through exposing students to the working world of which they were soon to be part (Thomson, 2014). Theorists in the 1980s developed this further, linking experiential learning with reflective practice. Professor David Kolb developed his learning styles model in 1984 which included a cyclical model for reflective practice; this was adapted by Graham Gibbs in 1988 into a six step reflective cycle (Kolb, 2014; Gibbs, 1988, Kemp, 2016). At the same time Schon developed the theory of the reflective practitioner (Schon 1983; Kemp, 2016). These theories stressed the importance of putting into practice the theoretical knowledge acquired through education and reflecting on the outcome, which would develop students' ability to improve their professional actions and judgment and to adapt to changing circumstances in the workplace.

As these educational theories were applied to the study of law, this led to renewed interest in CLE which enabled students to experience practical legal work whilst studying for their law degree. There was 'a flurry of activity on the clinical front' in the 1990s led by the Universities of Northumbria, Sheffield Hallam, and Kent (Grimes, 2000). During this time the nationwide Clinical Legal Education Organisation was formed.¹

At this time there was a marked difference between universities founded since 1960 and those founded earlier. Kemp notes that CLE 'has effectively been pioneered by recently established universities' with a 'relatively low level of support for CLE activities provided by traditional' (i.e. older university) law schools (Kemp, 2016). Kent and Warwick were founded in 1965, York in 1963 and Northumbria, Nottingham Trent, and Sheffield Hallam in 1992. The first 1994/5 LawWorks survey noted that 23% of the new universities offered live client clinics, while only 5% of the old universities offered the same (Grimes, 2000). The inclusion of CLE programmes into new universities' undergraduate courses offered an opportunity to focus on students' employability skills, improve students' opportunities of obtaining graduate employment and assist in student recruitment and marketing. However, the new universities were also open to adopting the new experiential educational pedagogies which supported this approach (Kemp, 2016). By contrast the old, more traditional universities tended to adopt a conventional 'black letter' approach to legal education informed by their research (Kemp, 2016).

In response to the educational theories on experiential and reflective learning, the UK also saw a rise in simulated clinics and activities during this time. York University Law School was influential in simulated experiential learning, as well as offering students an opportunity to work with 'live' clients in their law clinic (Kemp, 2016).

There was further incremental growth in the number of law schools introducing CLE in the 2000s including Nottingham Trent University, Strathclyde University and Lancaster University. This seems to have been in response to employers' concerns about the lack of appropriate

¹ <http://www.cleo-uk.org/>

skills of law graduates entering the profession. The development of CLE in the UK during the first forty years therefore focused on the educational benefit to students of acquiring employability skills rather than concerns about social justice. However, this changed in the 2010s, when there was an explosion of interest in CLE in the UK.

2.5 The growth of CLE in the UK in 2010s

Since 2010 there has been a rapid expansion of CLE within UK law schools. As will be discussed below, these changes were driven by a focus on employability following the adverse economic climate in this decade and social justice concerns following reform of the legal aid scheme.

The UK legal profession faced a perfect storm in the 2010s. The economic recession in 2008, the globalisation of the legal profession and the potential impact of technology led to new pressures and uncertainties for law firms (Thomson, 2014). Law students became concerned about whether there would be a reduction in the size of the legal profession and shrinking graduate job opportunities, while law schools considered whether traditional legal education was sufficient to properly prepare graduates for the realities of legal practice which had become more uncertain in the 21st century (Thomson, 2014).

At the same time, student tuition fees at English universities (which were introduced at the rate of £1,000 a year in 1998) were increased to £3,000 a year in 2004 and then up to £9,000 a year in 2010 (Anderson, 2016). Students were concerned about their chances of obtaining a job within the legal profession at the end of their university studies, at the same time their tuition costs rose nine-fold. In response, many universities turned to CLE as a way to enhance the graduate employment opportunities of their students and reassure their students about their future employability. The pedagogical basis of CLE in developing reflective practitioners able to discover, synthesize and apply relevant legal principles in any substantive or developing area of law offers some assurance that law students will be able to work in a rapidly changing legal arena and profession (Goldfarb, 2012). The practical work experience offered by CLE increases students' employability and is seen as giving them a competitive edge when applying for graduate legal jobs (Kemp, 2016).

The second factor which led to an increase in clinical programmes was increasing unmet legal need following the reform of the legal aid scheme introduced by the Legal Aid Sentencing and Punishment of Offenders Act 2012. As part of the spending and efficiency cuts introduced following the 2008 recession, the government reformed the legal aid scheme to reduce costs. The majority of civil law was taken out of the scope of legal aid, and after 2012 state-funded legal aid was not generally available for issues involving social welfare, debt, employment, family, housing and mental health law. Where legal aid remained, the financial eligibility criteria were made more severe so that most of those in employment were no longer eligible for legal aid. The same budgetary constraints affected local authorities who stopped funding advice centres and law centres. Following 2012 the number of legally aided solicitors, not-for-profit law clinics and legal advice agencies drastically reduced leading to 'advice deserts' in geographical areas of the UK. This had a disproportionate effect on the ability of the most vulnerable and marginalised groups to access justice (Sommerland and Sanderson, 2013; Law Society, 2017). The level of unmet legal need increased dramatically, something not previously seen in the UK (Law Commission, 2014).

While the first 40 years of the development of CLE in the UK focused on the educational benefits for students, the last decade has presented mounting levels of unmet legal need which clinicians and law students responded to by developing programmes that could assist with social justice and access to justice for the public, particularly in civil law issues. Concurrently there was a vigorous debate about the role of CLE and whether it is the responsibility of clinical programmes or the government to improve access to justice (Kemp,

2014). These two forces (employability and social justice) still shape the contemporary landscape of CLE in the UK as will be discussed in Part 2 below.

3. The contemporary CLE landscape

The previous section has traced the development of clinical legal education from its origins as a pedagogical counterweight to the prevailing case study method used in US law schools, to its later expansion across common law jurisdictions. It also has traced the increasing importance given to social justice in the practice of clinical legal education in UK law schools. This section aims to take stock of the contemporary position of clinical legal education within university law schools before progressing to a discussion on the future directions of this increasingly influential sub-discipline in Part 3. It begins by placing current CLE practice in UK law schools in the context of the contemporary global clinical movement, before highlighting how this pedagogy can be adapted for delivery in an online distance learning environment, using The Open University Law School's Open Justice Centre as a case study. This exploration of the use of technology to design and deliver experiential learning activities, which are the bedrock of clinical programmes, is of particular contemporary significance due to the Covid-19 pandemic. Social distancing measures have made it more difficult for universities to run face-to-face clinical programmes and interest in online alternatives has unsurprisingly increased.

3.1 CLE in Global Perspective

Frank Bloch's edited collection on clinical legal education gave a clear illustration of the global reach of this pedagogical approach (Bloch, 2010). By 2020, strong international networks of clinical educators had become well established. These now include the Global Alliance for Justice Education, in addition to active regional and national bodies including the European Network for Clinical Legal Education, the US-based Clinical Legal Education Association, and the UK-based Clinical Legal Education Organisation to name but a few. These groups support a vibrant programme of conferences, seminars and knowledge sharing events. The plethora of professional organisations devoted to clinical legal education is supplemented by a growing number of journals which address clinical legal education issues including the International Journal of Clinical Legal Education, the Clinical Law Review, the Journal of Public Legal Education, the Law Teacher and the Asian Journal of Legal Education. Thus, it is not unreasonable to claim that the reach and influence of clinical legal education has never been greater than it is in 2020. This is borne out by the UK experience briefly addressed below.

3.2 CLE in the UK today

CLE is a significant feature in the curricula of UK law schools. The most recent published comprehensive survey of clinical activity was conducted by Carney *et al* in 2014 on behalf of Law Works.² The survey has taken place periodically since the mid-1990s and offers a useful snapshot of CLE activity in UK higher education. In 1995, less than a quarter of post-1992 Universities and only 5 % of pre-1992 Universities ran clinical programmes (Grimes, 2000). From this modest base, the most recent survey demonstrated 96% of law schools who responded reported running some form of clinical activity, estimated at over 10 000 students taking part in CLE activities across the UK (Carney *et al*, 2014).

The 2014 survey highlighted the variety of activities taking place under the CLE umbrella. Public legal education activities were reported as being the most common, followed by the more resource-intensive provision of legal advice services. Other work included criminal

² Law Works is the Law Society's pro bono charity. The Law Society is the professional body for Solicitors operating in the legal system of England and Wales. The latest survey of UK law schools is being conducted in 2020.

appeal project and court and tribunal support and representation in addition to miscellaneous work such as mentoring and form-filling assistance. (Carney *et al*, 2014). The trend towards incorporating clinical methods into the assessment regime of undergraduate legal education continued in an upward direction, with 25% of law schools providing academic credit for their CLE programmes, an increase from a base of 10%. (Carney *et al*, 2014,) Drummond and McKeever's (2015) more recent but smaller survey of 62 university law schools highlights the importance of collaboration with external partners. Three quarters of their respondents reported collaboration with external partners as being important to help university clinics to expand the range of types of advice that can be adequately supervised.

Clinical practitioners continue to develop innovative ways of offering legal advice clinics including in 2015 Nottingham Trent university becoming the first law clinic regulated as an alternative business structure by the Law Society. This offers their students the opportunity to undertake experiential learning within a regulated environment, as well as offering the potential to charge fees for the legal advice work it undertakes with members of the public (Kemp, 2016). Other law schools developed partnerships with organisations to provide legal advice and assistance such as the Community Legal Outreach Collaboration Keele (CLOCK) (Keele University) and partnerships with the Welsh Rugby Union (Swansea University) and Dementia UK and the Alzheimer's Society (University of Manchester).

The increase in clinical activity, and the move towards more of it being formally assessed, is perhaps reflective of the broader trends identified in Part II of universities foregrounding the development of skills that are attractive to employers, in addition to increased competition amongst higher education providers to offer innovative educational experiences to their prospective students. However, notwithstanding these market-driven influences, both surveys highlighted the social justice and educational values as being key motivating factors for the academic staff working to provide these opportunities (Carney *et al*, 2014; Drummond and McKeever, 2015)

3.3 The Open University and CLE

Law was a relative latecomer to The Open University (OU) curriculum. The OU began to offer law degrees, in partnership with the College of Law, in 1997 before releasing its own degree curriculum in 2014. The Open Justice Centre was established as part of the expansion of the OU Law School in 2016 with the aim of utilising digital technologies to provide opportunities for students to participate in clinical legal education. The OU law student body is unique, not only being the largest in Europe, with over 7000 students, but also in the prevalence of part-time learners and its use of distance learning pedagogy. This meant that many of the traditional modes of clinical legal education discussed earlier in this chapter would have to be reimagined in order to allow online distance learning students to participate. The problem, as outlined in McFaul *et al* (2020), was to design a learning programme that could engage students studying mostly part-time and based across the four nations of the UK in meaningful and socially useful legal pro bono activities. The solution was to develop *Justice in Action*, a 30-credit level 6 module which was incorporated into the undergraduate law degree. The module is delivered online in three phases:

3.3.1 Phase I

This introduces students to academic discourse around themes of social justice, professional identity, and professional ethics before developing transferable skills of legal research, writing, oral advocacy and online collaboration. There is specific focus on how technology is transforming the delivery of legal services and on developing the skills and competencies required for professional practice.

3.3.2 Phase II

This involves students collaborating online to support the delivery of a range of pro bono projects. These projects fit into three broad categories: bespoke online projects run entirely online, projects which are prepared and supported online but delivered in face to face settings, and projects which are hosted by external partners. Bespoke online projects include our online legal clinic (Ryan, 2019), providing supervised legal advice to members of the public on civil law issues, in addition to the Digital Justice project which supports students in the creation of smartphone apps and chatbots for the delivery of public legal information (McFaul *et al*, 2020). Projects supported online but delivered in face-to-face environments include prison-based legal research and guidance sessions, in partnership with the St Giles Trust, in addition to a series of school-based Street Law sessions. Projects hosted by external partners include externships with legal support charities such as Support Through Court and Citizens Advice.³

3.3.3 Phase III

The final phase of the module requires students to produce an assessed reflection on their participation, drawing on the themes introduced in phase I.

The module has now grown to take an intake of just under 200 students per year, with a significant number of additional students taking part in clinical projects on an extracurricular basis. The Open Justice Centre has demonstrated that it is possible to take the essence of clinical legal education that is now a mainstay of legal education throughout the world, and to translate it successfully into an online environment. That is not to say that the endeavour is not without significant challenges, an account of which, in addition to a summary of the emerging pedagogical issues presented by this approach, is given in McFaul *et al* 2020. A key consideration in the development and evaluation of the Open Justice Centre's experiment with online experiential legal education, is the role that technology may play in shaping not only the next 50 years of legal education, but the legal profession itself: topics which will be addressed below.

4. The Future of CLE

Having traced the rise in experiential learning, and the rich history of clinical legal education, in this section we consider the factors that might shape the future of CLE over the next 50 years. Each law school has developed its own approach to clinical legal education, and this functions to allow universities to differentiate and create unique offerings within their own institutions. There is evidence to suggest that both students and employers place value on the practical legal skills that are developed through engagement in clinical programmes (Thomas 2018). It might therefore be assumed there will be an expansion of CLE over the next 50 years.

4.1 Expansion and sustainability

While the last fifty years has seen the establishment and rise of clinical legal education programmes, the next fifty years are likely to be about sustaining programmes over the long term. One of the challenges universities face is how to provide scalable work-related opportunities for students. Clinical programmes are expensive to run because the need for supervision requires lower student-to-teacher ratios and resources are required to ensure the value and benefits of CLE can be delivered (Gilman, 2019). In examining how UK law schools foster the sustainability of CLE, we must consider that universities are in a period of transformation and the future of curriculums is linked to both changes to the profession and the policies of universities (Giddings, 2008). Many law schools have embedded CLE into their

³ A fuller account of Open Justice projects is available at <<http://law-school.open.ac.uk/open-justice>>.

curriculum as credit-bearing modules; this approach has been adopted as a means of ensuring the continued viability and sustainability of clinical work.

In line with the changes proposed by the Solicitors Regulation Authority (SRA) to the way in which solicitors train and qualify in England and Wales, there may be further opportunities to embed clinical programmes into the curriculum for those law graduates who want to become solicitors.⁴ The Legal Services Board have approved the SRA plans to replace the Legal Practice Course with the two-part Solicitors Qualifying Examination (SQE). To qualify as a solicitor in England and Wales, students will need to have a degree in any subject (or equivalent qualification or work experience), pass both SQE 1 and 2 and have two years' qualifying work experience (QWE).⁵ Although the new regulations retain a period of legal work experience, qualifying work experience is more flexible than its predecessor, the training contract, as it can be undertaken across four different organisations and there is the potential for a wider range of experiences to qualify. The draft regulations do not specify what type of work experience counts for QWE. The SRA state that QWE is any experience of 'providing legal services' that provides the opportunity to develop some or all of the competencies required to practise as a solicitor.⁶ The SRA has indicated that clinical legal education can qualify as work experience. However, the draft regulations do not reference CLE or law clinics; therefore, at the current time it is still uncertain as to what could count as QWE.

Responding to these changes raises interesting questions about the potential impact on the pedagogical value of clinical programmes. Students may be attracted to universities that offer opportunities to count their time in clinical legal education projects as part of their qualifying work experience, and some universities might be attracted to the idea of making such an offer as a way of pursuing competitive advantage, both of which have implications for CLE's educational and social justice value. Clinical work enables students to develop a range of skills and has a role in supporting student employability about which Thomas (2018) argues law schools should be more explicit.

Students often have different or mixed motivations for doing CLE: some are deeply concerned about social justice whilst others are interested in improving their employment prospects (McKeown, 2015 and 2017). The potentially different drivers for CLE are not necessarily problematic, but there are increasing pressures on universities to meet changing student expectations. If law schools place unrealistic expectations on clinical programmes to use CLE as a means of offering QWE to service student demands, that has the potential to undermine the core values of CLE and pro bono. The increasing focus on clinical programmes brought about by SQE will require law schools to pay close attention to the challenges and opportunities presented, and multiple strategies may be required to develop different clinical methodologies.⁷

⁴ From September 2020 qualification as a barrister requires a degree in law (or another subject plus the Graduate Diploma in Law). Further, a vocational component consisting of Bar training with an Authorised Education and Training Organisation is required. The Bar Standards Board website details the organisations that have been authorised to provide the vocational training. Once the training has been completed the person is required to undertake a 12-month pupillage which is a period of work based and practical training under the supervision of an experienced barrister.

⁵ In Scotland the Solicitors (Scotland) Act 1980 sets out the training and legal education requirements for entry into the Scottish legal profession. Solicitors in Northern Ireland are regulated by the Law Society of Northern Ireland. The Institute of Professional Legal Studies (IPLS) at Queen's University, Belfast, is responsible for the professional training of solicitors and barristers. Trainee solicitors must undertake a 2-year apprenticeship which combines office-based work with studying the Certificate of Professional Studies at the IPLS. Solicitors who have qualified in England and Wales and Scotland may transfer to NI without taking any further exams.

⁶ SRA (note 4) Regulation 2.3(b).

⁷ For more discussion on QWE see Roper, V, Dunn, R and Kennedy, V. (2020) Clinical legal education as solicitor qualifying work experience in Thomas, L. and Johnson, N. (2020) Clinical Legal Education Handbook, University of London Press.

One interesting way that CLE might be developed is through the creation of a law firm within a law school. Johnson (2020) describes the model as a 'teaching law firm' that has similarities with clinical methodologies developed in US law schools. Some law schools may consider replicating the approach of Nottingham Trent Law School and applying for an alternative business structure (ABS) licence which allows for charging for some services. Nottingham Trent University's Legal Advice Centre provides a business and enterprise service that offers affordable legal advice to small businesses, charities and not for profit companies (Connelly, 2017). It is not a straightforward process to become an ABS and requires a significant commitment and investment from the university, but one of the benefits is the ability to charge for some services which may allow for some recuperation of costs. Although this may offer new ways of ensuring affordable access to legal services it is not without risk.⁸ There may be a growing interest in this approach as a way of delivering QWE. The offering of QWE may also align with individual university's broader strategy to embed employability further into its curricula especially for those universities whose students lack the connections and networks to advance easily into the profession. However, it is a strategy that is not without risk as extending clinical programs to include QWE requires support from the university to prioritise and well-resource CLE to ensure it preserves its rich learning environment and community benefit.

4.2 New models of clinical legal education

The expansion of clinical pedagogy in UK law schools has led to the development of different models of clinical legal education and these are likely to evolve further over the next 50 years. The increased use of technology in a post-COVID world requires law graduates of the future to be a different kind of legal professional who can work in teams with both an understanding of technology and creativity (Ryan, 2020). The Law Society (2018) argues that future lawyers need to be agile and adaptable, curious, and imaginative, coupled with having initiative and an entrepreneurial mindset. As technology transforms old ways of working future workers will need to develop virtual collaboration skills. The ability to use conference platforms and apps to maintain relationships with colleagues and clients is going to be critical for adapting to the changing work environment. Remote working and virtual collaboration are the new norm; clinical programmes are well positioned to respond to these changes and help students develop the skills and attributes required for new ways of working. This is recognised by the OU Law School: the creation of the Open Justice virtual law clinic gives students the opportunity to work with clients at a distance to acquire those skills (Ryan, 2020).⁹

Technology is not just changing how we interact at work, but in line with changes that are happening more broadly within the labour market it is also leading to questions about how new technologies will affect future jobs. Automation and algorithms have the potential to impact on all areas of work, including the delivery of legal services. Technology will create new opportunities, but it will also reduce some types of work (World Economic Forum, 2018). It is not just a proficiency in technological skills that is going to be important, but 'human' skills such as critical thinking, complex problem solving, persuasion and emotional intelligence are becoming even more valued (World Economic Forum, 2018). Current clinical pedagogies expose students to situations that challenge and test them; they encounter ethical issues and complex client situations that support the development of 'human skills' (Giddings, 2008). As we move into the next 50 years, technology is going to further augment and disrupt many industries. We need to consider how to leverage technology to develop new models of CLE that will not only enhance student learning, but support access to justice.

⁸ The creation of Alternative Business Structures to develop separate legal entities to deliver legal services has implication for social justice. Charging for legal services brings an ABS into competition with law firms, this may impact on the wider relationship with the legal profession. An exploration of these issues is outside the scope of this chapter but should be considered in further research.

⁹ <https://www.open.ac.uk/open-justice/legal-advice>

The use of artificial intelligence-based technology within legal practice has been much discussed, but the development of legal tech solutions has not so far been on the scale predicted by proponents of the tech revolution such as Richard Susskind¹⁰ (Sako *et al*, 2020). However, COVID- 19 may accelerate the adoption of new technologies to meet the challenges created by the economic consequences of the pandemic. In the future, we may see an investment in technology to move towards different operating models for legal practice. Working with emerging technologies will require a multi-disciplinary team approach that includes lawyers working with non-lawyers like data scientists, project managers and designers. This may become a new pattern of working in the future (Sako *et al*, 2020). Clinical programmes may explore new models of CLE to provide students with opportunities to work with technology in multi-disciplinary teams.

In recognition of the challenges posed by technology, UK law schools have started experimenting with legal tech and offering students hands-on opportunities to engage with emerging technologies. There is also a growing interest in the potential of legal tech to address the access to justice crisis (McFaul *et al*, 2020). Legal tech projects provide the opportunity for interdisciplinary and cross-faculty collaborations bringing together both students and academics to develop innovative technological solutions to benefit society (McFaul *et al*, 2020). The interest in legal tech has been influenced by the approaches adopted by some US universities, in particular the Legal Design Lab at Stanford University.¹¹ One of the functions of the Legal Design Lab is to be an interdisciplinary programme that introduces human-centred design methodologies into legal education. It adopts an experiential learning approach to its teaching and works in partnership with community organisations to develop innovative solutions to access to justice problems (Hagan, 2020). The future of CLE could see the further development of initiatives that adopt a partnership and multidisciplinary approach. One area where there needs to be more research is how more incubator projects can be scaled up beyond the law school (McFaul *et al*, 2020).

In the future we may also see the development of more project-based clinical legal education that shares some similarities with the work of the legal design labs but incorporates legal project management into its teaching (Carpenter, 2020). In project-based clinical legal education, the learning is student-driven; students work in interdisciplinary teams on a real-world problem to develop a project plan in collaboration with a project partner that could be a community organisation, the courts, or a group of self-represented litigants. The teacher facilitates and supports the team, but the group is responsible for managing all aspects of the project. Carpenter (2020) argues that students learn resilience and it helps to prepare for them for a complex changing world. Moving forward, clinical programmes are likely to continue to innovate to find new ways of bridging the gap between students' learning and supporting community engagement.

4.3 Looking to the future

The future of clinical legal education looks bright. The value of experiential learning in providing students with the opportunity to develop multidisciplinary skills required to navigate a changing world is recognised by many in legal education (Giddings *et al*, 2020). The potential to harness technology to help build and improve legal systems can drive future innovation in clinical legal education. But it is also recognised that there are challenges; higher education is dominated by neoliberal forces of globalisation, massification and marketisation (Bosanquet *et al*, 2020). Clinical programmes are not immune from the impact of neoliberal ideologies of increasing participation and the drive to create competitive advantage. The changes proposed by the regulators in England and Wales are complex and clinical programmes may struggle to

¹⁰ Richard Susskind argues that technology is going to transform the practice of law in many of his publications including *Tomorrow's Lawyers* (2019) Oxford University Press.

¹¹ <http://www.legaltechdesign.com/>

respond to the potential competing priorities of students and law schools. QWE may offer strategic opportunities for universities but it is not without risk. Law schools need a clear vision and adequate resources to expand their clinical programmes to provide students with these experiences. These are interesting times, but there is much reason for optimism, as over the past 50 years CLE has been able to navigate a complex path to becoming a defining feature of legal education. Although there may be challenges ahead, we are confident that CLE will remain a vibrant and dynamic part of the curriculum.

5. Conclusion

This chapter has explored the development of CLE in and beyond the UK and considered its contribution to enriching the learning experiences of law students. It has shown the important contribution clinical programmes make to developing law students' skills, but also to teaching the values of equality and justice. For those students who want to practice law after graduation, clinical work gives them the opportunity to work with clients and introduces them to practical legal work. At the same time, clinical programmes have expanded, and students benefit from a variety of innovative clinical learning experiences that have a broader and multidisciplinary focus.

COVID 19 has demonstrated how CLE is able to respond to a changing environment. Clinical programmes have begun to embrace digital technologies in a way that was unimaginable prior to the pandemic to ensure that they continue to deliver experiential learning opportunities for students and to support those with unmet legal need. Clinical legal education will face many challenges in the coming 50 years, especially in response to shifting regulatory frameworks, increasing pressures on university budgets and the accelerated pace of digital change instigated by the pandemic. However, this chapter's exploration of the history of CLE provides grounds for optimism that this dynamic pedagogy can continue to make a dynamic contribution to the future of legal education.

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